Name: **Sinnai Pedro**
Student ID: **23688330**
Birthdate: **12/31/1994**

Print Date: 06/10/2023
Unofficial Transcript

Institution Info: The University of Arizona

Beginning of Law Record

Academic Program History

Program: James E. Rogers College of Law
05/28/2021 Active in Program
Major in Law

Fall 2021

Course	Description	AHRS	EHRS	Grade	Points
LAW 600A	Contracts	4.000	4.000	B+	13.332
LAW 601A	Civil Procedure	4.000	4.000	B-	10.668
LAW 603A	Legal Resrch, Analysis & Com I	3.000	3.000	B	9.000
LAW 604C	Torts	4.000	4.000	B-	10.668
LAW 679B	Preparing to Practice	1.000	1.000	P	0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	2.911	16.000	16.000	15.000	43.668
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	2.911	16.000	16.000	15.000	43.668

		AHRS	EHRS	QHRS	Points
Cum GPA:	2.911	16.000	16.000	15.000	43.668
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	2.911	16.000	16.000	15.000	43.668

Spring 2022

Course	Description	AHRS	EHRS	Grade	Points
LAW 602	Criminal Procedure	3.000	3.000	B	9.000
LAW 603B	Legal Rsrch, Analysis & Com II	2.000	2.000	B-	5.334
LAW 605	Property	4.000	4.000	B	12.000
LAW 606	Constitutional Law I	3.000	3.000	B	9.000
LAW 620	Immigration Law	3.000	3.000	A-	11.001

		AHRS	EHRS	QHRS	Points
Term GPA:	3.089	15.000	15.000	15.000	46.335
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	3.089	15.000	15.000	15.000	46.335

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.000	31.000	31.000	30.000	90.003
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.000	31.000	31.000	30.000	90.003

Fall 2022

Course	Description	AHRS	EHRS	Grade	Points
LAW 624B	AJELP	2.000	2.000	P	0.000
LAW 631A	Federal Indian Law	3.000	3.000	A-	11.001
LAW 668	Pretrial Litigation	3.000	3.000	P	0.000
LAW 669	Environmental Law	3.000	3.000	B	9.000
LAW 674	Clinical Practice	3.000	3.000	A	12.000
Course Topic:	Clinic				
LAW 695	Special Topics in the Law	1.000	1.000	P	0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	3.556	15.000	15.000	9.000	32.001
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	3.556	15.000	15.000	9.000	32.001

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.128	46.000	46.000	39.000	122.004
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.128	46.000	46.000	39.000	122.004

Spring 2023

Course	Description	AHRS	EHRS	Grade	Points
LAW 609	Professional Responsibility	3.000	3.000	B	9.000
LAW 624B	AJELP	1.000	1.000	P	0.000
LAW 656C	Indian Energy Law	2.000	2.000	B	6.000
LAW 656F	Clt Prop Indigenous Peop	2.000	2.000	A	8.000
LAW 674	Clinical Practice	3.000	3.000	A	12.000
Course Topic:	Intl Human Rights Advoc Wrkshp				
LAW 695	Special Topics in the Law	1.000	1.000	S	0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	3.500	12.000	12.000	10.000	35.000
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	3.500	12.000	12.000	10.000	35.000

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.204	58.000	58.000	49.000	157.004
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.204	58.000	58.000	49.000	157.004

Name: Sinnai Pedro
Student ID: 23688330
Birthdate: 12/31/1994

Print Date: 06/10/2023
Unofficial Transcript

Summer 2023

Course	Description	AHRS	EHRS	Grade	Points
LAW 608	Evidence	3.000	0.000		0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	0.000	3.000	0.000	0.000	0.000
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	0.000	3.000	0.000	0.000	0.000

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.204	61.000	58.000	49.000	157.004
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.204	61.000	58.000	49.000	157.004

End of Law Record

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to you to unequivocally support Sinnai Pedro-Avila's candidacy for a judicial clerkship. I was involved in hiring and directly supervised Ms. Pedro-Avila during her time as a Diversity Legal Writing Intern at my firm, Lewis Roca Rothgerber Christie LLP. She would be an asset in any judge's chambers because of her strong writing, rigorous legal analysis, high-level executive functioning, and ability to integrate well with a diverse team.

When Ms. Pedro-Avila started with Lewis Roca, we laid out goals for her and for us. We hoped she would have the opportunity to work projects requiring different writing styles, research capabilities, and analysis, and we hoped we would get work product that we could easily utilize on behalf of our clients. She took on more than five projects during her internship with us, including a research memorandum on Daubert motions, an analysis of state securities law, and an extensive memorandum comparing and contrasting the requirements for the disposal of renewable energy sources for each state and Federally.

Her work was particularly impactful on the memorandum regarding regulations for end-of-life renewable energy. We gave Sinnai a rudimentary, incomplete survey of state regulations and asked her to write the first draft of an article distilling the information for attorneys who may not specialize in this field. We had Sinnai start with an outline, which she created on her own and to which we made no edits. Sinnai then not only synthesized the survey we gave her, she also took the initiative to fill in gaps and find other states with comparable regulations. Since renewable energy sources are just now reaching the end of their lives at a critical mass, there is not a lot of direct guidance as to how these regulations might be interpreted or applied. To better explain these regulations, Sinnai found a case study in one state and used that as an illustration of how other states may interpret their own laws. Her writing was clean, well-organized, and easily understood.

In my personal experience as a judicial extern, I found initiative, curiosity, and retention to be the most useful, and Ms. Pedro-Avila has them in spades.

We also found Ms. Pedro-Avila to have a quick learning curve and astute processing skills. Every time we gave her notes on a brief—even topline notes—she was able to understand what we were looking for, and an already strong draft got that much better. Most of all, we only ever had to give her any one bit of feedback once. Once she had received a note, she incorporated that feedback into her writing going forward.

Ms. Pedro-Avila integrated well into the Lewis Roca offices, working easily with a core team that has been together for a long time. But she also brought her unique perspective to the work community, improving our efficacy and camaraderie.

By the end of her time with us, we believe Ms. Pedro-Avila had improved on her already-impressive writing and obtained a stronger grasp of the flow of litigation. She also exceeded our internal goals by incorporating seamlessly into our team and asking thoughtful questions that not only showed her deep level of consideration of the matter at hand, but forced us to address assumptions and unknown unknowns about our cases that we otherwise would have missed.

It is my privilege to support her candidacy for a judicial clerkship. If you have any questions or require additional information, please do not hesitate to ask.

Sincerely,
Patrick Emerson McCormick

Patrick Emerson McCormick - PMcCormick@lewisroca.com - (323) 395-3546

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:
I write in enthusiastic support of Sinnai Pedro-Avila's application for a clerkship in your chambers. I am currently an Associate Professor of Law at the University of Arizona James E. Rogers College of Law. I had the pleasure of teaching Ms. Pedro-Avila in my Spring 2022 Immigration Law course and of working with her via the Immigration Law Students Association, for which I am Faculty Advisor and she was Events Coordinator.
Ms. Pedro-Avila would make an excellent law clerk. She has distinguished herself throughout her law school career, as reflected by her multiple achievement scholarships and her community leadership and law journal involvement. Her prior career as a Field Deputy for Congresswoman Lucille Roybal-Allard also demonstrates dedication to the public interest, strong leadership qualities, and critical thinking abilities.
Although Immigration Law is a lecture course, I had the opportunity to get to know Ms. Pedro-Avila well due to her high participation in class and her frequent visits to my office hours. Ms. Pedro-Avila stood out from among almost 50 students for her contributions to class discussion. Ms. Pedro-Avila participated thoughtfully from the start, demonstrating insight, intelligence, and a strong work ethic. She drew often upon her background as a child of immigrants herself as well as her experiences working as a Congressional staffer, adding depth and richness to our discussion.
Ms. Pedro-Avila also took the time to linger after class and drop by office hours. I found her to be prepared, engaging, respectful, and professional in all of my interactions with her. Her questions were always thoughtful, delving into technical aspects of the material as well as broader policy and scholarly concerns.

Immigration Law is among the hardest subjects for law students to grasp, as it involves an incredibly complex statutory code and synthesis of administrative law, constitutional law, and federal courts. Ms. Pedro-Avila displayed a strong grasp of the material in her engagement with myself and her fellow students. She received an A- in the course based on her performance on the final exam: a terrific grade in light of our strict curve. She wrote an excellent exam that showcased strong legal analysis and writing ability.
Ms. Pedro-Avila's prior and upcoming work experience serve as excellent preparation for a judicial law clerk. This summer, she will intern at Earth Justice, engaging in in-depth legal research and writing for complex federal litigation cases. She previously completed legal internships at both a private law firm and a non-profit, Lewis Roca in Tucson and the Native Hawaiian Legal Corporation in Honolulu. In her prior work experience with the Immigrant Defenders Law Center, she helped prepare legal filings and created case management plans.
Ms. Pedro-Avila demonstrates the qualities of an ideal public servant. Her commitment to justice is unparalleled, and she is a natural leader. While working in the congressional office of the Honorable Ms. Roybal-Allard, she helped advance immigration, health, veterans affairs, and environmental safety issues. She regularly drafted memos and led large-scale community events.
Ms. Pedro-Avila continued to show qualities as a leader and dedicated public servant within our law school student body. She has served on the boards of both our Immigration Law Students Association and our Native American Law Students Association – two of our most active and engaged student groups here at Arizona Law. She is also a member of the Arizona Journal of Environment Law & Policy.
In addition to being intelligent, talented, and hard-working, Ms. Pedro-Avila displays keen intellectual curiosity and insight. She is extremely collegial and has a great sense of humor. I

truly enjoyed all my interactions with her, and believe she would complement the dynamic of any chambers.
In short, I recommend Ms. Pedro-Avila with great enthusiasm and without reservation. I have no doubt that she will make an outstanding lawyer and law clerk. Please do not hesitate to reach out if you have any questions or if there is any way I can be helpful to your process.

Sincerely,

Eunice C. Lee
Associate Professor of Law
University of Arizona
James E. Rogers College of Law

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand that Sinnai Pedro-Avila has applied for a judicial clerkship in your Chambers, and I am pleased to provide this letter of recommendation on her behalf. I am a Regents Professor at the James E. Rogers College of Law at the University of Arizona, and Sinnai just finished her second year of our J.D. Program. Sinnai was a student in my fall 2022 Federal Indian law class, and she also took my Cultural Property seminar this spring. Sinnai's academic performance was excellent, and she earned "A" grades in each class. I also served as the faculty supervisor for Sinnai's graduation writing requirement, which she completed in connection with an article for the Arizona Journal of Environmental Law and Policy. Sinnai is a student editor for the Journal, and she wrote an outstanding article on global biodiversity.

Sinnai is a bright and enthusiastic student who offers interesting perspectives during class discussions. Sinnai was always on time and prepared for class. She has an excellent work ethic and is intellectually engaged in her law school classes. I met with Sinnai during office hours and was always impressed with her questions and her dedication. These qualities will also make her an excellent judicial clerk. Sinnai has a warm and friendly personality, and she gets along very well with her peers and her faculty members. Sinnai is always willing to help others, and she is consistently professional and respectful in her interpersonal interactions.

Sinnai has excellent research and writing skills. Sinnai's journal article and her seminar paper reflect her ability to find the relevant academic and case materials for her topic and generate an insightful analysis. Sinnai impressed me with her meticulous research and organizational skill. She carefully proofed her work and met each deadline for her drafts. Sinnai's final papers are polished and professional, demonstrating her skill as a writer and her attention to detail. The Federal Indian law class involved a midterm and final exam. Sinnai excelled on both exams, demonstrating mastery of the subject and excellent analysis. On the basis of her academic work in these classes, I believe that Sinnai would be an outstanding judicial clerk.

Sinnai has a sincere commitment to achieve justice for underserved communities, and she is very interested in environmental law. Sinnai grew up in the Los Angeles area and hopes to return to California to practice law. Sinnai will soon be starting a summer internship with Earth Justice, and last summer she completed an internship with the Native Hawaiian Legal Corporation. In addition to these internships, Sinnai completed a writing internship with the Tucson office of Lewis and Roca this spring. Sinnai's work experience and dedication to legal research and writing will further prepare her for a judicial clerkship.

Thank you for considering Sinnai Pedro-Avila for this clerkship opportunity. Sinnai is an excellent candidate for the judicial clerk position, and I highly recommend her. I know that Sinnai will work very hard to excel as a judicial clerk, and I believe that you would enjoy working with her. If I may be of further assistance in the selection process, please contact me at rebeccatsosie@arizona.edu or by telephone at 602-326-8897.

Sincerely,

Rebecca Tsosie
Regents Professor and Morris K. Udall Professor of Law

Sinnai Pedro-Avila
1321 South Boyle Avenue #3202, Los Angeles, CA 90023 • (323) 670-5717 • sinnaip@arizona.edu

Writing Sample

This excerpt is from my Note during my time with the *Arizona Journal on Environmental Law & Policy*. Although the original Note is much longer, I omitted portions for brevity. The scope of this excerpt is limited to some of the primary legal inequities that prevent Indigenous peoples from using their medicinal plants as an exercise of religion. The work presented in this writing sample reflects conversations with my advisor on this topic. It has not been substantially edited by others and is primarily my own writing.

Indigenous Peoples' Spiritual Rights to Medicinal Plants

I. Plant Medicines Should be Decriminalized for Indigenous Spiritual Practices

Since the start of colonialism, Indigenous peoples have found ways to protect their culture and spirituality despite the dominant Christian religion being forced on them. Andrew Wakonse Grey, an Osage Native American Church Leader said the Native American Church is "not a religion but a ceremony. At the turn of the 19th century, many tribes had to hide their ceremonial ways within a religious structure called the Native American Church."[1] The current dominant structure is composed of western constitutional laws that often infringe on Indigenous peoples' rights to practice their spirituality by criminalizing plant medicines that Indigenous peoples consider sacred.

Many Indigenous peoples' plant medicines have been classified as Schedule 1 drugs and deemed to contain hallucinogenic properties under the Controlled Substances Act of 1970 (CSA).[2] As a result, the CSA has labeled several plant medicines drugs thereby criminalizing Indigenous peoples' ceremonial and healing practices as this section will explain. This is an example of epistemic injustice,[3] where the western dominant culture fails to understand Indigenous peoples' spiritual relationship with medicinal plants so colonial governments create harmful policies that

[1] Dennis Zotigh, *Native Perspectives on the 40th Anniversary of the American Indian Religious Freedom Act*. https://www.smithsonianmag.com/blogs/national-museum-american-indian/2018/11/30/native-perspectives-american-indian-religious-freedom-act/.
[2] 21 U.S.C. §§ 801-966.
[3] Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1152 (2012).

affect Indigenous peoples' cultural survival. Still, Indigenous communities have asserted their sovereignty by protecting their traditional knowledge, ceremonies, and plant medicines.

Sovereignty can look like Indigenous communities advocating to protect the sacredness of their plants such as peyote and excluding non-Indigenous people from commodifying them as seen in the peyote context. When Indigenous peoples' sovereignty is ignored, their traditional knowledge about medicinal plants becomes appropriated, extracted, and commodified without regard for Indigenous peoples' scientific contributions or spiritual concerns. This is why it is imperative that governments like the United States ratify the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[4] and the United Nations Convention on Biological Diversity (CBD).[5] Both international frameworks uphold Indigenous peoples' rights to medicinal plants and spiritual practices. The following medicinal plants are examples that are currently being contested under the CSA and are on the list of many decriminalization campaign efforts across the nation, which aim to legalize the recreational use plants like peyote and ayahuasca for non-Indigenous people.[6]

A. Native American Church's Battle to Lawfully Use Peyote as Sacrament

Spanish historical records mention peyote in Mexico as early as 1560,[7] and its history traces back to Southern Mexico tribes, including Aztecs, Huichol, Tarahumari, Lipan Apaches, and

[4] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/61/295 (Sept. 13, 2007), available at https://www.un.org/development/desa/indigenouspeoples/declarationon-the-rights-of-indigenous-peoples.html (hereinafter "The Declaration").
[5] Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (May 6, 1992), available at https://www.cbd.int/convention/text/ (hereinafter "Biological Diversity").
[6] In 2019, Oakland, California passed a local ordinance that decriminalized using entheogenic plants and fungi.[6] Similarly, in 2020, Oregon voters passed Measure 10, which legalized psilocybin mushrooms for behavioral health purposes. https://oakland.legistar.com/LegislationDetail.aspx?ID=3950933&GUID=5E53E7F6-F79F-433D-B669-0D687786590F&Options&Search. *See* Merrit Kennedy, *Oakland City Council Effectively Decriminalizes Psychedeic Mushrooms*, Nat'l Public Radio (Jun. 15, 2019), https://www.npr.org/2019/06/05/730061916/oakland-city-council-effectively-decriminalizes-psychedelic-mushrooms. In 2019, Oregon voters also passed Measure 110 to decriminalize small possessions of all drugs, including peyote and mescaline. *See* Oregon Senate Bill 755(measure 110), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB755/Enrolled.
[7] *People v. Woody*, 61 Cal. 2d 716, 722 (1964) (hereinafter "Woody").

Mescalero Apaches.[8] Many Native nations use peyote as an ancestral spiritual practice, including the Comanche and Kiowa, while others have adopted its usage more recently like the Navajo.[9] By the latter part of the 19th century, peyote had already established its cultural presence among many Native American nations.[10] For many Native American Church (NAC) members, peyote "embodies the Holy Spirit" and those who partake in peyote ceremonies "enter into direct contact with God."[11]

Peyote's chemical property is mescaline, which the CSA classifies it a mind-altering Schedule 1 drug.[12] In *People v. Woody*, a California District Court explained that to "forbid the use of peyote is to remove the theological heart of Peyotism," which would interfere with Native Americans' religious practice.[13] Throughout history, Native communities have fought for their spiritual and cultural rights such as the time whe they fought for peyote to be decriminalized when used as sacrament during NAC ceremonies.

In *Employment Division, Department of Human Resources v. Smith*, two Indigenous members of the NAC were fired for using peyote, and they were denied federal unemployment benefits because their use of peyote was deemed a "work-related misconduct."[14] The United States Supreme Court refused to apply the *Sherbert v. Verner* balancing test,[15] which helped courts determine whether a government action that substantially burdened a religious practice was justified by a "compelling government interest."[16] Instead, the United States Supreme Court denied

[8] James D. Muneta, *Peyote Crisis Confronting Modern Indigenous Peoples: The Declining Peyote Population and a Demand for* Conservation, 9 American Indian L. 136, 1148 (2020).
[9] Rebecca Tsosie & Wallace Coffey, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stanford Law & Policy Rev. 191, 208 (2009).
[10] *Id.*
[11] *People v. Woody*, 61 Cal. 2d 716, 720 (1964).
[12] 21 U.S.C. §§ 801-966
[13] Woody, *supra* note 11 at 722.
[14] *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 872 (1990).
[15] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[16] *Employment Div. Dep't of Human Res.*, *supra* note at 883.

the NAC and its Native members the right to use peyote in ceremonies reasoning that it would have been improper to require the government to prove a compelling state interest when it tried to limit the conduct of using peyote – a central aspect to a person's religion.[17] The court decided that the *Sherbert v. Verner* balancing test could not be used for a drug ban,[18] subjecting Native communities to continued discriminatory treatment by denying them unemployment benefits. The Court should have applied the *Sherbert v. Verner* balancing test because the two fired employees had used peyote for a religious purpose – just like plaintiffs in any other religious case – but the Court treated the use of peyote as the conduct of using a drug for the purposes of the case.

In response to the *Employment Division* ruling, Congress amended the American Indian Religious Freedom Act (AIRFA) to decriminalize and protect peyote use for Native American ceremonial purposes in 1994.[19] Congress recognized that for many Native Americans, "the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures."[20] As a result, the Drug Enforcement Administration (DEA) exempted peyote use from the Controlled Substances Act when NAC members used it as a sacrament.[21] Indigenous communities risked their lives to protect the sacredness of their spiritual and cultural practices,[22] and many Native nations continue to fight to ensure their cultures are not appropriated by non-Natives.

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[17] *Id.* at 890.
[18] *Id.* at 873
[19] 42 U.S.C. § 1996a (1994).
[20] Rebecca A. Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. State Law 299, 340 (2002).
[21] U.S. Dept. of Justice, *Peyote Exemption for Native American Church,* https://www.justice.gov/olc/opinion/peyote-exemption-native-american-church (last visited Apr. 27, 2023).
21 U.S.C. §§ 801-966
[22] For example, in 1890, the Lakota Native people were massacred at Wounded Knee for practicing the Ghost Dance, which the U.S. military saw as a threat that would lead to "an all-out Indian war." *See* Patti Jo King, *The Truth About the Wounded Knee Massacre*, Indian Country News (Sep. 13, 2018), *https://ictnews.org/archive/the-truth-about-the-wounded-knee-massacre*.

Recently, many non-Native advocates across the country have been urging state legislators to decriminalize and legalize peyote for recreational and commercial use.[23] Indigenous communities, including Navajo Nation leaders, oppose efforts aimed at legalizing the use of peyote for recreational and commercial public use. Madam Chair Eugenia Charles-Newton, a Navajo leader from Shiprock, stated that peyote is sacred medicine in NAC ceremonies, and efforts to "decriminalize peyote threaten the historical, cultural, and biological integrity of its sacredness.[24]

B. Ayahuasca: Non-Indigenous Churches Use the Law to Practice Ayahuasca Ceremonies While the Law Would Likely Criminalize Indigenous Practitioners

Amazonian Indigenous healers originally used ayahuasca in ceremonies for healing and spiritual purposes. In addition to ayahuasca's medicinal uses, Indigenous communities also used it for "planning when and where to grow crops, hunt, and fish, and in general adopt important decisions for the community's future."[25] Its main psychoactive ingredient, DMT, is listed as a Schedule 1 drug under the Controlled Substances Act.[26]

Ayahuasca has been primarily used by three Brazilian churches, tourists, and recreational users.[27] The oldest of the Brazilian churches is known as Santo Daime, which is a synchronistic practice that converges Indigenous and Christian traditions.[28] In recent years, a growing number of westerners have sought ayahuasca retreats as a form of alternative healing to help cure

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[23] *See* Decriminalize Nature, which is a campaign that promotes the legalization of entheogenic plants, fungi, and natural resources such as "mushrooms, cacti, iboga containing plants and/or extracted combinations of plants similar to ayahuasca." https://www.decriminalizenature.org/.
[24] Chacruna Inst., *The Navajo Nation to Protect the Sanctity of Azeé – Peyote Medicine from Legalization and Commercial Use*, https://chacruna.net/najavo_statment_against_peyote_decriminalization/ (last visited Sept. 25, 2022).
[25] *Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region,* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. https://www.oas.org/en/iachr/reports/pdfs/panamazonia2019-en.pdf
[26] 21 U.S.C. §§ 801-966.
[27] Jonathan Hamilton et al. *Ayahuasca: Psychological and Physiologic Effects, Pharmacology and Potential Uses in Addiction and Mental Illness*. *Current neuropharmacology* Vol. 17, 2 (2019): 108-128. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6343205/
[28] *Id.*

depression and addictions to alcohol and drug.[29] Other tourists appropriate ayahuasca by utilizing it as a recreational drug or tourism activity instead of a serious medicine.[30] The following section will focus on how some Brazilian churches have successfully argued that the Religious Freedom and Restoration Act (RFRA)[31] protects their spiritual and religious practices and conduct – including using ayahuasca as a sacrament.

a. **Spiritual Rights to Ayahuasca under RFRA Despite CSA Restrictions**

In April of 1980, the United States ratified the 1971 United Nations Convention on Psychotropic Substances,[32] and made a reservation to allow the Native American Church to continue using peyote. Under this Convention, both properties of the plant medicines discussed earlier – mescaline and DMT – are classified as Schedule 1 substances.[33] Schedule 1 substances have the most comprehensive restrictions, including a complete ban on its importation and use, except for "strictly regulated research projects."[34] The CSA also imposes criminal sentences for people who possess Schedule 1 substances with intent to distribute or dispense the substance.[35]

RFRA aims to protect the right to free exercise of religion and provides that "governments should not substantially burden religious exercise without compelling justification."[36] Congress enacted RFRA to protect religious freedom after the Supreme Court denied the Native American

[29] David Hill, *Peru's ayahuasca industry booms as westerners search for alternative healing.* The Guardian. 2016. https://www.theguardian.com/travel/2016/jun/07/peru-ayahuasca-drink-boom-amazon-spirituality-healing
[30] *Id. See* Hadar A, David J, Shalit N, Roseman L, Gross R, Sessa B, Lev-Ran S, *Psychedelic Renaissance in Clinical Research: A Bibliometric Analysis of Three Decades of Human Studies with Psychedelics*. J Psychoactive Drugs. 2022 Jan 9. National Library of Medicine, https://pubmed.ncbi.nlm.nih.gov/35000572/.
Donna Lu, *Psychedelics renaissance: new wave of research puts hallucinogenic forward to treat mental health*. https://www.theguardian.com/society/2021/sep/26/psychedelics-renaissance-new-wave-of-research-puts-hallucinogenics-forward-to-treat-mental-health.
[31] 42 U.S.C. §§ 20000bb. – 20000bb-4.
[32] United Nations Convention on Psychotropic Substances, G.A. Res. 3443 (Feb. 21, 1971), https://www.unodc.org/pdf/convention_1971_en.pdf.
[33] *Id.* at 17.
[34] *Gonzales v. O Centro Espírita Beneficente União do Vegeta*, 546 U.S. 418, 425 (2006).
[35] *Id*.
[36] 42 U.S.C. § 20000bb(a)(3).

Church the right to use peyote as a sacrament.[37] To successfully argue that RFRA protects the use of a medicinal plant, a plaintiff must demonstrate that the CSA prohibition of their medicinal plant would: "(i) substantially burden, (ii) [their] religious exercise, (iii) based on sincerely held beliefs,[38] and that the prohibition on their sacrament under the CSA does not further compel governmental interests by the least restrictive means."[39]

Recently, non-Indigenous ayahuasca churches[40] have been utilizing RFRA to protect their right to plant medicines for religious purposes. Legal precedent has been increasingly permitting churches and established religious groups to use RFRA as a means to use plant medicines like ayahuasca. Meanwhile, independent Indigenous healers, whose ancestors have stewarded the plant, would unlikely be able to practice their ayahuasca ceremonies in the United States because they are not practicing under an established faith group that can successfully use RFRA. To exemplify, Church of Holy Light of Queen and O Centro Espírita Beneficente União do Vegetal – both created by non-Indigenous people[41] – show the complexities and rigorous requirements that even churches must meet to succeed on a religious rights suit under RFRA.

Santo Daime,[42] a Brazilian ayahuasca religion, had to choose between following the law or practicing the use of their plant medicine. In *Church of Holy Light of Queen v. Mukasey*, an

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[37] *Gonzales v. O Centro Espírita Beneficente União do Vegeta*, 546 U.S. 418, 436-437 (2006).
[38] *Id.* at 418.
[39] *Id.* at 424.
[40] Jennifer Ross, *Battle for the Legality and Legitimacy of Ayahuasca Religions in Brazil*, Western Oregon University (Dec. 12, 2012) https://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1009&context=his. "Ayahuasca is a hallucinogenic concoction that is said to have been used for thousands of years by various indigenous tribes who lived throughout the upper Amazon and Andes. . . Ayahuasca is a hallucinogenic concoction that is said to have been used for thousands of years by various indigenous tribes who lived throughout the upper Amazon and Andes." This medicinal plant was traditionally used in ceremonies led by a *curandeiro*, *vegetalismo*, or *ayahuasquero*.
[41] Both churches were created by non-Indigenous peoples and neither of their website give credit to the Indigenous communities that introduced them to ayahuasca. *See* Centro Espírita Beneficente União do Vegetal https://udvusa.org/our-history. *See* The Church of The Holy Light of The Queen https://www.chlq.org/about-chlq.
[42] *Church of Holy Light of Queen v. Mukasey,* 615 F. Supp. 2d 1210, 1212-1213 (2009). "Santo Daime is a syncretic religion, blending elements of Catholicism with indigenous Amazonian and African beliefs. Followers of the Santo Daime religion believe that Daime tea is the blood of Christ, analogous to wine in the Catholic Communion. They

Oregon Federal District Court ruled in favor of the church using ayahuasca and compared this plant to the role of peyote in the Native American Church:

> The ceremonial use of Daime tea is "the sine qua non of [plaintiffs'] faith. It is the sole means by which [plaintiffs] are able to experience their religion; without [Daime tea], [plaintiffs] cannot practice their faith."[43]

The District Court's decision permitted Santo Daime to use ayahuasca and prevented the DEA from stopping the church's importation of ayahuasca. [44]

The court explained that the federal government may burden a person's exercise of religion *only* if it proves that the burden to the person's religious right will further a compelling governmental interest, and it is the least restrictive means to fulfill that compelling governmental interest.[45] The Oregon District Court explained that to establish a prima facie RFRA claim, a plaintiff must meet two elements. "First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion.' Second, the government action must 'substantially burden' the plaintiff's exercise of religion."[46] Here, the plaintiffs met their burden of proof by establishing a prima facie claim, demonstrating they are sincere in their religious practice, and that ayahuasca is essential to their religion.[47] The court ruled that the DEA did not meet its burden to show it had a compelling interest – even though DMT is a Schedule 1 drug in the CSA – because RFRA requires a more "specific inquiry" into the government's compelling interest.[48]

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also believe that Daime tea itself is a holy being of great power. Daime tea is consumed during all Santo Daime services. CHLQ cannot survive as a viable church without the Daime tea."

[43] *Id.* at 18-19 citing *People v. Woody*, 61 Cal. 2d 716, 725(1964).

[44] *Id.*

[45] 42 U.S.C. § 2000bb-1(b).

[46] *Church of the Holy Light of the Queen,* 615 F. Supp. 2d 1210, 1219 (2009).

[47] *Id.*

[48] *Id.* at 1220.

In 2006, the União do Vegetal (UDV) church that uses ayahuasca tea in its religious ceremonies won a landmark case at the United States Supreme Court. In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, UDV brought a RFRA claim against the DEA for confiscating their plant medicine and threatening prosecution if the church continued to practice its religious rituals using ayahuasca.[49] The government's primary argument before the Supreme Court was that it had a compelling interest to enforce the CSA, and that no exception could be made for hallucinogens even if it was part of UDV's sincere religious practice.[50] The United States Supreme Court issued a groundbreaking ruling on ayahuasca when it affirmed that the government had not met its burden under RFRA and that the government failed to demonstrate that the CSA "furthered compelling interests in the least restrictive means with respect" to the church's religious exercise.[51] The Court explained that under RFRA's focused inquiry in the compelling interest test, the government's reliance on ayahuasca being a Schedule 1 substance under the CSA could not carry the day just because the plant was classified a Schedule 1 substance in the CSA.[52]

It is important to note that Indigenous peoples were not represented in the cases above because neither groups in the ayahuasca cases claimed to be Indigenous nor have a "unique relationship" with the federal government like federally recognized tribes do. Tribes' "unique relationship" with the United States is partly governed by the federal trust responsibility doctrine. The federal trust doctrine arose out of *Cherokee v. Georgia*, where the Supreme Court held that tribes are not foreign nations but domestic-dependent nations with a relationship with the federal government that resembles that of a "ward to his guardian."[53] As harmful as the federal trust

[49] *Gonzales v. O Centro Espírita Beneficente União do Vegeta*, 546 U.S. 418 (2006).
[50] *Id.* at 423.
[51] *Id.*
[52] *Id.*
[53] *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

doctrine is, it also commits the federal government and courts to recognize Native Nations' unique status when drafting laws.

Native tribes have a *sui generis* classification and political relationship with the United States that is not afforded to other groups.[54] In *Morton v. Mancari*, non-Native employees of the Bureau of Indian Affairs (BIA) filed a class action suit claiming that an employment preference for Native Americans was a violation of the Equal Employment Opportunities Act.[55] The Court reasoned that the "Indian employment preference" for federally recognized tribal members would survive a rational basis review test[56] because the federal government's special treatment of Native Americans was rationally related to Congress' "unique obligation" to tribes.[57] In *Morton v. Mancari*, the Supreme Court held that an "Indian preference" to hire or promote within the Bureau of Indian Affairs did not violate the Equal Employment Opportunities Act because Native Americans are a "political group" with a unique relationship with the United States.[58]

Although Native Americans have a unique relationship with the federal government, this was not been a primary argument point in cases related to religious freedom rights and plant medicines that have been discussed in this Note. In the *Gonzales* case, the government tried to argue that *Employment Division* was an exception to the Controlled Substances Act because the United States had a "unique relationship" with tribes.[59] The Supreme Court did not give much weight to the federal trust responsibility in the *Employment Division* nor *Gonzales*, so the cases have not been helpful to Indigenous communities striving to protect their spiritual right to their medicinal plants.

[54] *Morton v. Mancari*, 417 U.S. 535, 554 (1974).
[55] *Id.* at 539.
[56] *Id.* at 555.
[57] *Id.* at 536.
[58] *Id.* at 551.
[59] *Id.* at 433-434

While RFRA has proven to protect the right to traditional plant medicines for the NAC and some ayahuasca-based churches, RFRA has only protected their religious rights so long as the medicinal plants were integral to a sincere religion. This is problematic when applied to Indigenous communities because they should have the right to self-determine their traditional and spiritual ways of healing without an established religious institution and without presenting evidence of having a "sincere" and "bonafide" religion.

a. **Major Inequities Blocking Indigenous Peoples' Rights to Medicinal Plants**

First, a major flaw with RFRA is that it protects religious exercise while neglecting Indigenous traditional healing practices that do not resemble the dominant Christian-based construction of religion. Spirituality and healing are interconnected, so there is potential for the law to protect Indigenous peoples' traditional and spiritual practices. As Andrew Wakonse Grey explained, many Native Americans were forced to hide their spiritual practices under the religious church structure of the NAC.[60] There is a critical need to continue developing discussions about how Indigenous peoples' spiritual rights to medicinal plants are just as integral to having peyote in the NAC or wine in the Catholic Church.

A second problem is that RFRA's sincerity element requires religious churches to prove that members are sincerely exercising a religion. This is once again placing requirements that are common practices among western churches – not necessarily applicable to Indigenous ceremonies. The sincerity element would likely force Indigenous communities to add such requirements to their traditional practices just to be able to qualify as a church. By aligning with western notions of religion, Indigenous communities in the United States would have a chance at winning under a RFRA argument to use their medicinal plants. This ultimately harming Indigenous peoples

[60] *Supra* note 1.

Furthermore, Indigenous peoples are not treated equally under United States law. If the plaintiffs are a member of a federally recognized tribe, they may be eligible for some protections for their medicinal plants like peyote. If they are not a member of a federally recognized tribe, but instead Indigenous migrants engaging in spiritual practices, then they would not be afforded those same protections.

Legal inequities persist because the CSA was constructed in favor of western notions of religion like the UDV and Santo Daime from Brazil. Whereas Indigenous communities like the Huichol tribe from Mexico would be found guilty of using peyote under the CSA and would be unlikely to win a case under RFRA because they would face difficulty meeting its requirements. This is fundamentally unequal, and the matter should be addressed by an international convention that protects Indigenous peoples' spiritual rights to medicinal plants as an exercise of sovereignty. A more practical goal could be that countries amend the United Nations Convention on Psychotropic Substances to exempt Indigenous communities from its regulations to allow their traditionally used medicinal plants. In the alternative, Indigenous peoples around the world could come together to create a list of certain medicinal plants that they wish to protect as an exercise of cultural and spiritual sovereignty. This list would have to be adopted as an international convention that countries sign, like the U.N. Convention on Psychotropic Drugs, and enforce domestically.

II. The United States Should Adopt International Standards to Protect Indigenous Peoples' Spiritual Rights to Plant Medicines

The United States has tried enacting federal laws aimed at protecting Native communities' religion, western and constitutional constructions of religion continue to deprive Native communities of exercising their spiritual and religious rights. For example, the Native American

Graves Protection and Repatriation Act,[61] the American Indian Religious Freedom Act,[62] and the Peyote Act[63] all aim to protect Indigenous peoples' rights, but they also create challenges to Native communities by forcing Native communities to "*defend* their cultural rights using the technical language of the statutes."[64] Meanwhile, the international community has created standards that encompass the dimensions of protecting Indigenous peoples' knowledge and spirituality as seen in the UNDRIP and CBD. Indigenous peoples can use these existing international frameworks for guidance to create their international document that will help nation-states understand Indigenous peoples' sovereignty in regard to their plant medicines, ceremonies, and traditional knowledge.

To this day, the United States has not ratified the United Nations Declaration on the Rights of Indigenous Peoples,[65] and is one of two member state countries that have not ratified the United Nations Convention on Biological Diversity.[66] Both international instruments hold valuable principles and standards that would significantly strengthen legal protections for Indigenous peoples' sovereignty, autonomy, cultural survival, and their rights to their spiritual and cultural practices.

(The rest of this section was omitted for brevity.)

Conclusion: Indigenous Peoples' Sovereignty and Autonomy is the Key

[61] 25 U.S.C. § 3001 (1990).
[62] 42 U.S.C. § 1996 (1978).
[63] 42 U.S.C. § 1996a (1994).
[64] Rebecca A. Tsosie & Wallace Coffey, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stanford Law & Policy Rev. 191, 207 (2001).
Federal statutes pose a challenge to Indigenous communities by forcing Indigenous peoples to justify and prove that their traditional cultural practices and medicinal plants are used for a sincere and bonafide purpose. Some issues that arise during evidentiary court hearings are that Indigenous knowledge keepers are forced to share their knowledge about their sacred ceremonies and stories behind their spiritual beliefs. For many Indigenous communities, not all knowledge can be publicly shared so much knowledge may not make it onto any legal documents to support a case for religious rights.
[65] The Declaration, G.A. Res. 61/295, UN Doc. A/RES/61/295 (Sept. 13, 2007).
[66] Biological Diversity, 1760 UNTS 79, 31 ILM 818 (May 6, 1992).

This Note argues that Indigenous communities should be able to practice their traditional plant ceremonies as an exercise of religion and spirituality anywhere, including in the United States. The international community must listen to Indigenous peoples from around the world as they form a convention that will bind member states to pass domestic laws that will uphold Indigenous peoples' rights to their spiritual practices, medicinal plants, and traditional knowledge.

As western cultures have become increasingly accepting of Indigenous plant medicines for recreational, religious, and medicinal purposes, laws need to uphold Indigenous peoples' sovereignty and autonomy. As I have explained, current United States domestic law will not carry the day to help protect Indigenous peoples' rights to medicinal plants and spiritual practices. There are several plant-medicine decriminalization efforts that are pushing lawmakers in state and local governments to legalize the recreational and commercial use of these medicinal plants – but for non-Indigenous people. Western constitutional laws have historically (and currently) afforded more rights to non-Indigenous peoples' religious practices, while those same laws have harmed and limited Indigenous peoples' spiritual and religious rights.

While the sacred has become politicized in the United States dichotomy of religious freedom rights, Indigenous communities continue to protect the sacred: ceremonies, plant relatives, knowledge, places, and our earth's biodiversity. Medicinal plants and ceremonies should be accessible to all Indigenous peoples who have a spiritual connection with such plants, especially on their ancestral territories and across colonial borders. It is imperative that countries recognize and uphold Indigenous peoples' rights to their medicinal plants as spiritual and cultural rights. Long before western laws existed, Indigenous peoples' were already rooted in their spiritual practices. Nation-state governments must respect Indigenous peoples' cultural and spiritual sovereignty especially as state and local governments begin discussing policies that could legalize

these medicinal plants to non-Indigenous peoples – possibly jeopardizing access to what is sacred and integral for Indigenous peoples' spiritual practices.

Applicant Details

First Name	**Keith**
Last Name	**Penney**
Citizenship Status	**U. S. Citizen**
Email Address	**kap248@cornell.edu**
Address	**Address** **Street** **6 Sunset Hill Road** **City** **Simsbury** **State/Territory** **Connecticut** **Zip** **06070** **Country** **United States**
Contact Phone Number	**8605976772**

Applicant Education

BA/BS From	**Williams College**
Date of BA/BS	**May 2021**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Cuccia Moot Court** **Rossi Moot Court** **Langfan Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Weyble, Keir
kw346@cornell.edu
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Rachlinski, Jeffrey
jjr7@cornell.edu
607-255-5878
Dorf, Michael
michaeldorf@cornell.edu
(607) 255-3890

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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06/09/2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers for the 2024-25 term. I am a rising third-year law student at Cornell Law School where I am an Articles Editor of the *Cornell Law Review*. In addition to my focus on legal academics, I was also president of the Cornell chapter of the American Constitution Society, organizing panel events, holding constitutional law review sessions for students, and hosting dinners with federal judges.

Enclosed are my resume, transcript, law school grading policy, and writing sample. Letters of recommendation from Cornell Law School professors Dorf, Rachlinski, and Weyble will follow. Please let me know if you require any additional information. Thank you for your consideration.

Sincerely,

Keith Penney

Keith Penney

Enclosures: resume, transcript, law school grading policy, and writing sample.

Keith A. Penney

6 Sunset Hill Road, Simsbury, CT 06070 | kap248@cornell.edu | 860-597-6772

EDUCATION

Cornell Law School — Ithaca, NY
Candidate for Juris Doctor — May 2024
GPA: 3.71
Honors: Fredric H. Weisberg Prize for Constitutional Law;
Myron Taylor Scholar (top 30% at end of 2L year); Dean's List (three semesters)
Activities: *Cornell Law Review*, Articles Editor; American Constitution Society, President;
Constitutional Law Teaching Assistant; Research Assistant to Professor Michael Dorf;
Langfan, Cuccia, and Rossi Moot Court; Moot Court General Board

Williams College — Williamstown, MA
Bachelor of Arts in Political Science — May 2021
GPA: 3.69
Honors: Dean's List (six semesters)
Activities: P3 Prison Tutoring

EXPERIENCE

Milbank LLP — New York, NY
Summer Associate — May 2023–July 2023
- Researched litigation strategy on statute of limitations for 12(b)(6) memo of a firm client.
- Prepared synopsis of SEC complaint to understand the direction of agency enforcement in novel area.

Capital Punishment Clinic, Cornell Law School — Ithaca, NY
Student Attorney — August 2022–December 2022
- Prepared section of parole memo for client incarcerated for over thirty years in South Carolina.
- Researched changes in South Carolina's capital punishment statute relevant to our client.

Cornell Defender Program — Bath, NY
Legal Intern — May 2022–August 2022
- Argued in front of judges during arraignment bail hearings.
- Researched novel issues related to New York "Raise The Age" legislation.
- Aided in the representation of a client during a felony robbery and burglary trial.

Mary Glassman for Congress — Simsbury, CT
Field Organizer — May 2018–August 2018
- Organized phonebank and canvas operations for a team of two dozen volunteers.
- Recruited campaign volunteers from forty-one towns across the district.

Connecticut Division of Public Defender Services — New Haven, CT
Legal Intern — September 2016–August 2017
- Reviewed jail phone call evidence with murder defendant as part of pre-trial preparation under attorney Michael Courtney.
- Conducted legal research on the admissibility of expert witnesses in Connecticut trials.

INTERESTS

Watching European soccer, following American politics.

Cornell Law School - Grade Report - 06/09/2023

Keith A Penney

JD, Class of 2024

Course	Title	Instructor(s)	Credits	Grade	
Fall 2021 (8/24/2021 - 12/3/2021)					
LAW 5001.1	Civil Procedure	Clermont	3.0	A-	
LAW 5021.1	Constitutional Law	Dorf	4.0	A+	CALI
LAW 5041.2	Contracts	Kadens	4.0	B+	
LAW 5081.5	Lawyering	Freed	2.0	B+	
LAW 5151.2	Torts	Hans	3.0	A+	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.8312
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.8312

^ Dean's List

Spring 2022 (1/18/2022 - 5/2/2022)					
LAW 5001.2	Civil Procedure	Gardner	3.0	B+	
LAW 5061.1	Criminal Law	Arnaud	3.0	A-	
LAW 5081.5	Lawyering	Freed	2.0	B+	
LAW 5121.1	Property	Dinner	4.0	A-	
LAW 6011.1	Administrative Law	Rachlinski	3.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.6226
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	3.7303

^ Dean's List

Fall 2022 (8/22/2022 - 12/16/2022)					
LAW 6131.1	Business Organizations	Hockett	3.0	B+	
LAW 6263.1	Criminal Procedure - Adjudication	Blume	3.0	A-	
LAW 6861.620	Supervised Teaching	Johnson	2.0	SX	
LAW 7811.301	Capital Punishment Clinic 1	Johnson/K. Weyble	4.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	12.0	12.0	12.0	12.0	10.0	10.0	3.5680
Cumulative	43.0	43.0	43.0	43.0	41.0	41.0	3.6907

Spring 2023 (1/23/2023 - 5/16/2023)					
LAW 6401.1	Evidence	K. Weyble	4.0	A-	
LAW 6431.1	Federal Courts	Gardner	4.0	A	
LAW 6436.1	Practicing Criminal Defense in Federal Court	Zelin	2.0	SX	
LAW 6437.1	Federal Practice and Procedure	Nathan	1.0	SX	
LAW 6641.1	Professional Responsibility	Atiq	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	11.0	11.0	3.7900
Cumulative	57.0	57.0	57.0	57.0	52.0	52.0	3.7117

^ Dean's List

Total Hours Earned: 57

June 2023

Cornell Law School

Lawyers in the Best Sense

Cornell Law School Grading Policy for JD Students

Faculty grading policy calls upon each faculty member to grade a course, including problem courses and seminars, so that the mean grade for JD students in the course approximates 3.35 (the acceptable range between 3.2 and 3.5). This policy is subject only to very limited exceptions.

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

Class Rank

As a matter of faculty policy, we do not release the academic rankings of our students. Interested individuals, including employers, have access to the top 10% approximate cumulative grade point cut off or the most recent semester of completion. In addition, at the completion of the students second semester and every semester thereafter the top 5% approximate cumulative grade point average is also available. In general students are not ranked however the top ten students in each class are ranked and are notified of their rank.

Class of 2023 [six semesters]:

5% - 3.9204; 10%- 3.8364

Class of 2024 [four semesters]:

5% - 3.9048; 10% - 3.7897

Class of 2025 [two semesters]:

5% - 3.9475; 10% - 3.8350

Dean's List

Each semester all students whose **semester** grade point average places them in the top 30% of their class are awarded Dean's List status. Students are notified of this honor by a letter from the Dean and a notation on their official and unofficial transcripts.

Myron Taylor Scholar

This honor recognizes students whose cumulative MPR places them in the top 30 percent of their class at the completion of their second year of law school. Students are notified of this honor by a letter from the Dean of Students.

Academic Honors at Graduation

The faculty awards academic honors at graduation as follows: The faculty awards the J.D. degree summa cum laude by special vote in cases of exceptional performance. The school awards the J.D. degree magna cum laude to students who rank in the top 10% of the graduating class. Students who rank in the top 30% of the class receive the J.D. degree cum laude unless they are receiving another honors degree. For the graduating Class of 2023, the GPA cut off for magna cum laude was 3.8364 and for cum laude was 3.6627. Recipients are notified by a letter from the Dean and a notation on their official and unofficial transcripts.

The Order of the Coif is granted to those who rank in the top 10% of the graduating class. To be eligible for consideration for the Order of the Coif, a graduate must be in the top 10% with 75% of credits taken for a letter grade.

Prior to fall 2018, faculty who announced to their classes that they might exceed the cap were free to do so. If the 3.5 cap was exceeded in any class pursuant to such announcement, the transcript of every student in the class will carry an asterisk (*) next to the grade for that class, and for various internal purposes such as the awarding of academic honors at graduation, the numerical impact of such grades will be adjusted to be the same as it would have been if the course had been graded to achieve a 3.35 mean.

For detailed information about exceptions and other information such as grading policy for exchange students please go to the Exam Information & Grading Policies link at http://www.lawschool.comell.edu/registrar.

Cornell Law School

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June 11, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Keith Penney for a judicial clerkship. I have known him since the start of the Fall 2022 law school semester, first as a student in the Capital Punishment Clinic that I co-teach, and more recently in my Evidence course.

Keith was a strong student in both the classroom and clinical settings. The Evidence class was relatively large, which limited the amount of interaction I could have with any individual student, but Keith made his presence known as a consistent contributor to classroom discussions. His comments were reliably insightful and well-considered, and reflected good preparation and thoughtful engagement with the course material. His final exam performance was also strong enough to place him in the top one-third of the class with a final grade of A-.

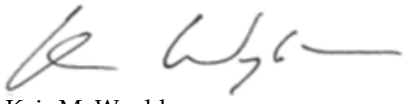
I spent more time with Keith, and had a fuller opportunity to observe and evaluate him, in the clinical setting. He was part of a four-student team assigned to investigate and identify claims for relief to be brought on behalf of a client whose conviction was relatively old, but against whom the evidence appeared especially (and troublingly) thin. The work ranged from records collection and review, to legal research and memo preparation, to several days of field investigation in the southern state where the client was convicted and sentenced. Keith approached every task – big and small, interesting and not-so-interesting – with enthusiasm. His work reviewing and cross-checking the case records demonstrated a keen eye for detail and connections, and led to several promising and previously unknown leads. His legal research and writing was sharp, focused, and cogent. And his work during the investigative trip was energetic, insightful, and productive. Across all of these tasks, and across the length of the semester, Keith also proved to be a quick and reliable worker who required no extra direction, and a natural, generous collaborator who was well-liked and respected by the other members of his team. In short, he performed very well on every task assigned and in every setting encountered during his time in the clinic.

In addition to the other strengths outlined above, I can also say without hesitation that Keith is a personable and likeable young man with a friendly, engaging personality and a good sense of humor. In combination with his intellectual gifts, his strong work ethic, and the ease with which he

gets on with others, I would expect him to be very successful as a judicial law clerk. I therefore recommend him highly and without reservation.

Please do not hesitate to contact me if I can provide you with additional information.

Sincerely yours,



Keir M. Weyble
Clinical Professor of Law

Cornell Law School

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June 11, 2023

The Honorable Jamar K. Walker
United States District Court
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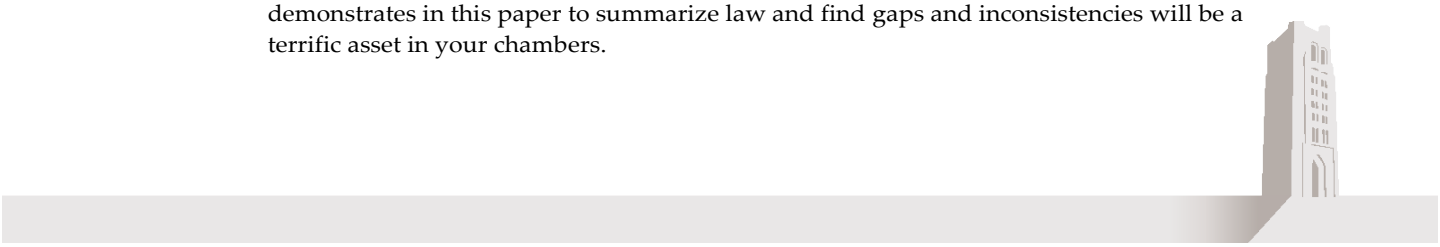
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write to you in support of Mr. Keith Penney's application for a judicial clerkship with you. Mr. Penney was enrolled in my Administrative Law course at Cornell Law School in the Fall of 2022 and in a Civil Procedure class I co-taught in his first year. I have had several discussions with Mr. Penney and called on him many times in class. Consequently, I came to know him fairly well.

Mr. Penney performed well in class. He was consistently prepared and demonstrated the ability to digest complex materials. He is also very good at thinking on his feet. Furthermore, he asked several interesting follow-up questions after class. It is clear that as Mr. Penney learned more, he became more engaged in the course. Several discussions with him also suggested to me that he is someone who likes to be challenged and gets more excited as the going gets tougher. He is also clearly a hard-working student who does not let himself get behind in his responsibilities.

I have also read Mr. Penney's student note. He discusses the different ways the Supreme Court has approached the concept of intent in constitutional law, from *Washington v. Davis* to *Trump v. Hawaii*. These cases concern how the Court is supposed to treat evidence (or lack thereof in some cases) that a governmental actor harbored an unconstitutional motive in enacting what would otherwise be a constitutionally permissive statute. He makes a plea for consistency and balance. The note shows a good eye for topics. He is clearly right that the Supreme Court adopts completely different approaches. For my taste, the note would have to address why consistency is needed in different contexts, but the piece hits the mark and is well worth reading. It is also very nicely written. In particular, it provides excellent, succinct summaries of the cases he discusses. The ability he demonstrates in this paper to summarize law and find gaps and inconsistencies will be a terrific asset in your chambers.



It is also worth noting that Mr. Penney has been an energetic and valuable member of our community. He has almost single-handedly revitalized the Cornell chapter of the American Constitution Society. Our students tend not to be politically oriented, at least for law students. They are focused on their careers, which largely take them to large law firms. I like their focus, but a well-rounded lawyer is also an engaged citizen who cares about politics and government. To my eyes, a robust law-school community needs the ACS and the Federalist Society on campus to engage in active, civil, constructive debate. The pandemic flattened out all of that, and we are grateful for students like Mr. Penney who are revitalizing this important aspect of our community. I am sure he will bring all of that constructive energy with him to your chambers.

In short, I recommend Mr. Penney to you as a clerk. In addition to his skills as a lawyer, he is a truly responsible, mature, and warm person. I have little doubt that you would enjoy working with him. If you have any questions about him, please feel free to contact me.

Very Truly Yours,

Jeffrey J. Rachlinski
Henry Allen Mark Professor of Law

Cornell Law School

MICHAEL C. DORF
Robert S. Stevens Professor of Law

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Ithaca, New York 14853-4901
phone or fax: 607.255.3890
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June 10, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

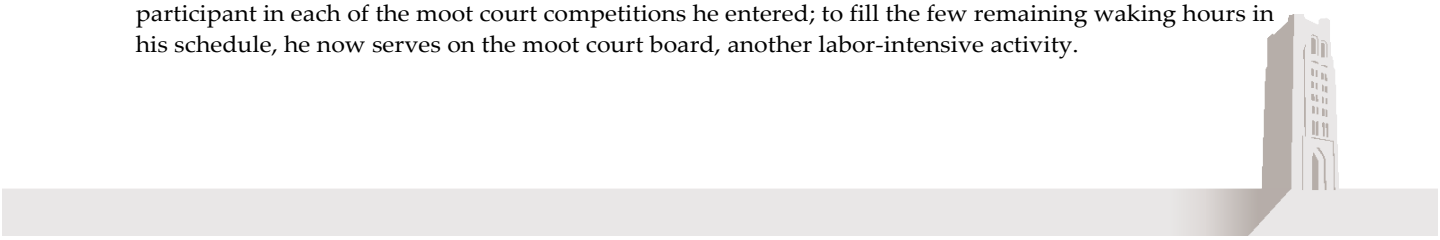
Dear Judge Walker:

I am writing to give my strongest possible recommendation for Keith Penney, who has applied for a position as a law clerk in your chambers following his graduation from Cornell Law School in May 2024. Keith brings a rare combination of first-rate intellectual firepower and an extraordinary work ethic.

Keith stood out as the top student in my constitutional law class in the fall of 2021. In class, his comments and questions showed a penetrating mind and, most impressive, an ability to understand the material in a wider historical and political context without losing sight of the relevant doctrinal framework. I often tell my students that legal realism is useful in advising clients and plotting litigation strategy but cannot be directly incorporated into advocacy. Keith grasped that insight without my need to explain it. He has an experienced lawyer's knack for making creative arguments that still color within the lines of the legal texts and precedents. I am sometimes surprised when I learn the identity of the student who wrote the top anonymously graded exam. I was not surprised in Keith's case. He was the best student in class discussion, and he wrote the top exam.

Based on Keith's outstanding performance in my class, I asked him to work for me both as a research assistant and a teaching assistant (TA). In the former role, he provided excellent material to help me in updating my constitutional law casebook for its next edition. In the latter role, Keith stood out. I have been blessed over the years with many terrific TAs. Most have gone on to have outstanding careers as lawyers. About a dozen are law professors. A few are judges. None did a better job as a TA than Keith did. Although attendance at his weekly review sessions was optional, the room was invariably packed. In their evaluations, the 1Ls in the class for which Keith TA'd uniformly praised the clarity of his presentations, his patience and thoroughness in answering their questions, and his availability at all hours to assist them. Frankly, I was a bit jealous of how they received his teaching relative to mine!

Keith's splendid performance as my TA was all the more remarkable in light of his very heavy workload. The Capital Punishment Clinic is practically a full-time job. Keith also was very active as an associate for the Cornell Law Review and in the Cornell Chapter of the American Constitution Society (ACS, for which I serve as faculty adviser). Given his excellent work in those organizations, he was chosen as an Articles Editor of the law review and as President of the ACS chapter. Meanwhile, Keith shone as a participant in each of the moot court competitions he entered; to fill the few remaining waking hours in his schedule, he now serves on the moot court board, another labor-intensive activity.



Despite his outstanding analytic ability, clarity of thought and expression, and doggedness, Keith is personally unassuming and modest. Calm and unflappable, he would be an excellent fit in just about any judicial chambers. I recommend him enthusiastically and without reservation.

Sincerely,

Michael C. Dorf
Robert S. Stevens Professor of Law

Writing Sample Cover Page

What follows is an unpublished draft of my Note unedited by anyone else. The topic is a comparison between the use of intent inquiries in different areas of constitutional law. The argument sections begin on page twelve of the document. I appreciate your consideration of my application.

Sincerely,
Keith Penney

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I. INTRODUCTION

The concept of "purging the taint" of impermissible animus has been gaining relevance among commentators on constitutional law. [1] The idea is fairly basic: what must be done for a state actor who had previously given indications of acting for an impermissible reason – either out of animus towards a disfavored group or out of pretext to conceal their otherwise bad intentions – to have sufficiently laundered away that impermissible intent so as to allow the action to be undertaken?[2] It's a simple concept with great importance for constitutional law. Cases involving ideas as vast as broad-scale immigration restriction turn on this question.[3]

This Note seeks to contribute to the existing scholarship on the topic by examining in detail how three cases in particular handle the intent inquiry, then recommending a specific approach to the resolution of the problem of purging the taint in explicit-intent animus cases. The first of these cases, *Trump v Hawaii*, relates to former President Trump's multiply-attempted "travel ban" of predominantly Muslim immigrants entering the United States.[4] The second, *Washington v. Davis*, is a landmark case in the Equal Protection context for its introduction of an intent inquiry into nearly all cases of disparate impact despite a facially neutral government action.[5] And the third, *West Lynn Creamery v. Healy*, is a case applying the Dormant Commerce Clause that shows how evidence of explicit intent can be used in cases that leave open questions on the borders of lines of constitutional law thinking.[6]

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[1] Michael C. Dorf, "Pretext and Remedy in the Census Case and Beyond", Take Care (July 7, 2019) (https://takecareblog.com/blog/pretext-and-remedy-in-the-census-case-and-beyond).
[2] *Id.*
[3] Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018).
[4] *Id.*
[5] Washington v. Davis, 426 U.S. 229 (1976).
[6] West Lynn Creamery v. Healy, 512 U.S. 186 (1994).

Each of these cases takes a different approach to determining the state actor's intent. The Court in *Trump v. Hawaii* mentioned, but decided not to weight heavily the President's statements that demonstrated ample hostility towards immigrants of a particular faith.[7] The Court in *Washington v. Davis* took a more balanced approach towards the assessment of intent, weighing the racially disparate effects of a police admissions test against the other steps taken to mitigate the problem of an unrepresentative police force.[8] And the Court in *West Lynn Creamery* took the stated intent of the drafters of the policy at their word, finding unconstitutionally protectionist a state policy that conjoined an otherwise-permissible tax with an otherwise-permissible subsidy.[9]

This Note argues that such a strict approach, preserving intent rather than allowing it to be purged through process, is preferable in cases where animus is explicit. Doing so allows for a more robust regime of constitutional protection while not opening the floodgates that the Court contemplated in *Washington v. Davis*. The requirements of *Washington v. Davis* and its successor cases are strict enough to prevent that from occurring while allowing redress for cases where the animus is clear without allowing it to be cleansed from the record. Overall, the framework provided in this Note is an effort to preserve explicit declarations of intent as a highly meaningful tool in any relevant intent analysis at time when there are early indications that their place might be weakened. Doing so is both simpler for courts and more effective for those seeking relief when targeted by unfair state action.

[7] Trump v. Hawaii, at 2417.
[8] Washington v. Davis, at 242.
[9] West Lynn Creamery, at 190.

II. BACKGROUND

a. Trump v Hawaii

In 2017, President Trump signed into law Executive Order 13769.[10] The full title, "Protecting the Nation From Foreign Terrorist Entry Into the United States", gives a good sense of its supposed intentions.[11] The Order banned travelers from seven Muslim-majority countries pending a review of the immigration process, checking for the sufficiency of information provided by foreign governments about their nationals seeking to enter the country, done by the Secretary of Homeland Security.[12] This order was immediately challenged in court.[13] After the Ninth Circuit declined to lift a temporary restraining order, the President revoked Executive Order 13769 and replaced it with Executive Order 13780.[1415] This new Order called for the same review of the immigration information provided by foreign governments while reducing the list of countries with temporary 90-day restrictions to six—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—while including a waiver process for individual travelers from the affected nations.[16] This order, too, was challenged, with District Courts in Washington and Maryland issuing nationwide preliminary injunctions and their corresponding Courts of Appeal upholding those injunctions.[1718]

The Executive Orders were heavily challenged for good reason. They were the fulfillment of then-candidate Trump's promise to impose a "total and complete shutdown" on

[10] Exec. Order No. 13769, 82 C.F.R. 8977 (2017).
[11] *Id.*
[12] *Id.*
[13] Washington v. Trump, 847 F. 3d 1151 (2017).
[14] *Id.* at 3.
[15] Exec. Order No. 13780, 82 C.F.R. 13209 (2017).
[16] *Id.*
[17] International Refugee Assistance Project (IRAP) v. Trump, 857 F. 3d 554 (2017).
[18] Hawaii v. Trump, 859 F. 3d 741 (2017).

Muslims entering the United States.[19] Originally announced in response to a mass shooting in San Bernadino, California, the idea behind this ban was supposedly to prevent future terrorist violence –the "Protecting the Nation Against Foreign Terrorist Entry" of the Executive Order's title.[20] This plan was criticized as racist, religiously discriminatory, a "betrayal of bedrock constitutional principles", and "un-American".[21] Despite this opposition, after his statements Trump surged to his largest lead to that point in the GOP primary.[22] Upon taking office, Trump enacted this policy without delay, passing the above-mentioned Executive Orders.[23] To dispel any doubt as to the intent of these Executive Orders, presidential advisor Rudy Giuliani told Fox News that President Trump had instructed him to form a commission to enact the Muslim ban through legal means, the result of which was Order 13769.[24] By focusing on regions of the world that were Muslim-majority rather than specifying the exclusion of the religion itself, Giuliani assured his boss, and the national news audience, that the measure was "perfectly sensible" as well as "perfectly legal".[25]

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[19] Amrit Chang, "Trump's Lawyers Say The Muslim Ban Has No Bias, But His Tweets Show Otherwise", ACLU (November 30, 2017), https://www.aclu.org/news/immigrants-rights/trumps-lawyers-say-muslim-ban-has-no-bias-his-tweets-show-otherwise

[20] *Id.*

[21] "NH, SC and Iowa GOP chairs criticize Trump's plan for Muslims", Theodore Schleifer, CNN (December 7, 2015), (https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-travel-ban-early-states/index.html).

[22] Dan Balz and Scott Clement, *In Face of Criticism, Trump Surges to his Biggest Lead Over GOP Field*, THE WASHINGTON POST, December 15th, 2015 (https://www.washingtonpost.com/politics/in-face-of-criticism-trump-surges-to-his-biggest-lead-over-the-gop-field/2015/12/14/b9555e30-a29c-11e5-9c4e-be37f66848bb_story.html).

[23] Exec. Order No. 13769; Exec Order No. 13780.

[24] Jim Dyer, *First Came Giuliani's Input on the Immigration Order. Now There's the Court Test.,* THE NEW YORK TIMES, February 9th, 2017 (https://www.nytimes.com/2017/02/09/nyregion/rudolph-giuliani-donald-trump-travel-ban.html)

[25] *Id.*

Plenty of commentators – and courts – disagreed with this legal assessment.[26] After the expiration of the temporary restrictions in Executive Order 13780, the President issued Proclamation 9645.[27] This Proclamation, given the wordy full title "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats", attempted to functionally refresh the bans from the original Executive Orders through a more robust procedure.[28] The President had requested that the acting Secretary for Homeland Security issue recommendations as to which countries remained so deficient in their information-sharing practices as to make advisable a bevy of specific restrictions on their entry to the United States.[29] After accepting the recommendations, the President issued the Proclamation, subjecting travelers from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen to broad-scale restrictions on travel to the United States with a case-by-case waiver process available.[30]

This Proclamation was also challenged.[31] Its opponents characterized it as a straightforward extension of the previous Executive Orders' attempts to make legal the clearly discriminatory "Muslim ban".[32] Following a suit by advocacy organizations on behalf of the family members of newly-excluded travel aspirants in Hawaii, the District Court issued another

[26] Amrit Cheng, "Trump's Lawyers Say The Muslim Ban Has No Bias, But His Tweets Show Otherwise", ACLU (November 30, 2017), https://www.aclu.org/news/immigrants-rights/trumps-lawyers-say-muslim-ban-has-no-bias-his-tweets-show-otherwise.
[27] Proclamation No. 9645, 82 C.F.R. 45161 (2017).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See* Cheng, *supra* note 19.
[32] *Id.*

nationwide preliminary injunction preventing the Provision from taking effect.[33] The appeals court affirmed this judgement, and the Supreme Court granted certiorari.[34]

The Supreme Court upheld the constitutionality of the Proclamation. After dispensing with a variety of statutory-interpretation questions, it found, despite the President's clear failure to live up to the nation's supposed ideas of religious tolerance, deference to the executive in the realm of national security justified the application of rational basis scrutiny.[35] Under this forgiving standard, the Proclamation was allowed to take effect[36], meaning that, whatever the mechanism, the Court had allowed the executive action to be cleansed of the original discriminatory statements.

b. Washington v. Davis

The landmark case in the facially-neutral equal protection context, *Washington v. Davis* reintroduced intent into the equal protection analysis even when the challenged state action did not explicitly single out a suspect classification for differential treatment.[37] This was a departure from previous cases – *Palmer v. Thompson* perhaps the most notable – where intent was found to be irrelevant to the equal protection inquiry.[38]

The facts of *Washington v. Davis* reveal why this was a case ripe for the Supreme Court to reintroduce the intent inquiry. The City of Washington, DC, administered to its police officer

[33] Hawaii v Trump, 878 F. 3d 662 (2017).
[34] Trump v. Hawaii, at 2417.
[35] *Id.* at 2419.
[36] *Id.* at 2423.
[37] Washington v. Davis, at 229.
[38] Palmer v. Thompson, 403 U.S. 217, 224 (1971).

recruits a test ("Test 21") of "communications skills" before offering them employment.[39] If they scored below passing on the test, they were not offered employment with the city's police force.[40] This test screened out a higher proportion of prospective Black officers than it did white officers.[41]

Screened-out prospective Black officers sued, claiming that the test's discriminatory impact sufficed to comprise a constitutional violation under the Equal Protection clause. They cited as evidence the fact that the city's police force was disproportionately white compared to the city itself and the areas surrounding it.[42] They also advanced the claim that Test 21, originally designed as a test of "verbal ability, vocabulary, reading and comprehension" for use by the Civil Service Department, was culturally biased to the benefit of white applicants and was shown to have little relation to the job performance of those prospective officers who did pass.[43]

The city countered with mitigating facts designed to show that Test 21 was not intended to function as a covert discriminatory screen in the application process. They highlighted that their overall recruitment strategy had produced incoming police force classes that were 44% Black among the age range from 20 to 29, which was approximately proportionate to the proportion of African-Americans in city combined with the 50-mile surrounding geographic radius in which they were concentrating their recruitment efforts.[44] They also asserted that Test 21 itself was not designed to have cultural biases in favor of white applicants and that it was a

[39] Washington v. Davis, at 234.
[40] *Id.*
[41] *Id.* at 236.
[42] *Id.*
[43] *Id.* at 235.
[44] *Id.* at 236.

useful part of determining which applicants would last through the intensive 17-week training process even if it was shown to have no relation to later job performance.[45]

The city won in district court. Although the court found that the evidence of disparate impact was sufficient to shift the production burden to the city, it ultimately determined that the evidence of active efforts to hire and maintain a diverse police force in relative, if not exact, proportion to the relevant geographic area for officers counted as sufficient proof of a lack of discriminatory intent in the retention of Test 21 as to defeat the equal protection claim.[46] It concluded that "the proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability" as a justification for its decision.[47]

The screened-out officers appealed and won at the DC Circuit Court of Appeals. That court determined that intent was irrelevant.[48] What mattered was the fact of the disparate impact -- four times as many otherwise-qualified Black applicants failed to pass the test than did similarly-qualified white applicants.[49] The court left open the idea that the city could show that the test was sufficiently related to job performance so as to justify it, but determined that it had not met this burden through its production of evidence showing the test's relevance to the training program.[50] And it did not assign much weight to the city's evidence that it had made material efforts to form a diverse corps of police officers, claiming that it had no bearing on the case at hand.[51]

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[45] *Id.*
[46] Davis v. Washington, 348 F. Supp 15.
[47] *Id.* at 19.
[48] Davis v. Washington, 512 F.2d 956.
[49] *Id.* at 958.
[50] *Id.* at 963.
[51] *Id.* at 960.

The Supreme Court reversed. In its decision, the Court relied on the lack of evidence of intentional racial discrimination, holding that such intent was a necessary part of any equal protection inquiry.[52] They provided a bevy of historical cases to support this conclusion[53], including *Strauder v. West Virginia*[54], distinguishing away those that indicated intent was irrelevant in the establishment of an equal protection violation.[55]

The Court would soon tighten the intent requirement. In *Feeney*, it held that the illicit intent must have been a but-for cause (rather than a regrettable side effect) of the challenged state action.[56] And in *Arlington Heights*, it ruled that such intent must be shown to have been motivating for a sufficient proportion of the relevant decisionmakers to constitute an irrebuttable intent claim – otherwise, the burden shifts to the government to make a showing that they would have undertaken the action even without the animus.[57]

Though some scholars have lamented the impact of the intent-mandatory regime, claiming that it results in undesirable denials of meritorious impact-focused equal protection claims, it remains the law today.[58]

c. West Lynn Creamery

[52] Washington v. Davis at 239.
[53] *Id.*
[54] Strauder v. West Virginia, 100 U.S. 303 (1880).
[55] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[56] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).
[57] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 255 (1977).
[58] *See* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 Harv. Civil Rights – Civil Liberties L. R., 1 (2001) (arguing that intent as a component of equal protection analysis was promoted by racial justice advocates in the wake of *Brown* to complicate accounts that argue against the modern intent-mandatory regime).

The least-discussed case on this list, *West Lynn Creamery*, was a 1994 case addressing the constitutionality of a Massachusetts tax-and-subsidy scheme for milk products.[59] Milk purchasers sued Massachusetts on the grounds that a system where all dairy purchasers were taxed in order to provide a subsidy directly to Massachusetts farmers was a violation of the Dormant Commerce Clause.[60] Both subsidies and non-discriminatory taxes are permissible on their own, but the plaintiff dairy buyers alleged that the structure of the Massachusetts scheme showed intent to create a tariff, which is unconstitutional.[61]

Relying on *Bacchus Imports*, the Court determined that the scheme was a tariff. In *Bacchus Imports*, they found unconstitutional Hawaii's scheme of taxing all liquor at wholesale 20% with an exemption for a specific type of brandy made from a Hawaiian shrub bush as well as pineapple wine.[62] They extended this precedent to the facts of *West Lynn Creamery*, finding no difference between the initial exemption for the Hawaii-specific liquors and the rebate scheme employed to protect the Massachusetts dairy industry.[63] Given that there was protectionist intent, the unconstitutionality followed, despite the facial permissibility of both elements independently.

III. Frameworks

Each of these cases, or lines of cases, takes a different approach to determining intent. But what were those approaches? And how do they bear on the ultimate outcome of each case?

[59] West Lynn Creamery, at 186.
[60] *Id.* at 197.
[61] *Id.*
[62] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263.
[63] West Lynn Creamery at 197.

Walking through their reasoning makes these differences, and their potential legal relevance, clearer.

a. Avoidance in Trump v. Hawaii

The plaintiff family members in *Trump v Hawaii* brought, inter alia, a claim that the Proclamation, as well as the two Executive Orders before it, violated the Establishment Clause of the Constitution.[64] Relying on the fact that five of the seven countries subject to the final restrictions were Muslim-majority, they claimed that these actions were "religious gerrymanders" designed to exclude otherwise-statutorily-qualified Muslims from entering the United States.[65]

The plaintiffs were attempting to avail themselves of long-established law that government actions undertaken out of religious prejudice were subject to heightened scrutiny by courts. In *McCreary County v. ACLU*, the Supreme Court held that a Kentucky county's display of the Ten Commandments on the walls of its courthouse was unconstitutional.[66] After walking through the specific choices made by the county in the design of its displays, with a focus on secular alternatives the county could have but did not pursue, the Court found the display of the Commandments to be a violation of the Constitution because its "predominant purpose" was to advance religion per *Lemon*.[67]

[64] Trump v. Hawaii, at 2415.
[65] *Id.* at 2417.
[66] McCreary County v. ACLU, 545 U.S. 844 (2005).
[67] *Id.* at 882.

In *Trump v Hawaii*, the plaintiffs could draw on a vast quantity of evidence showing both specific animus motivating the Proclamation itself as well as general anti-Muslim hostility from the President who issued the order. During the 2016 campaign, then-candidate Trump asserted on CNN that "Islam hates us", referring to the United States.[68] To clarify that he was promoting bigotry against most Muslims, he added in response to a request for clarification about whether he only meant "radical Islam" with "it's very hard to define. It's very hard to separate. Because you don't know who's who".[69] After his Republican National Convention speech, he was asked whether he was attempting to walk back his proposed Muslim ban.[70] He clarified that he didn't "think [his new proposal was] a rollback. In fact, you could say it was an expansion", adding that while "our Constitution is great" and something to "cherish", it "doesn't necessarily give us the right to commit suicide".[71] The language of "total and complete shutdown of Muslims entering the United States" remained on the Trump campaign website until 2017, after he assumed the office of the Presidency.[72]

These facts did not escape judicial notice. In its *Trump v Hawaii* opinion, the Court observed that President Trump had engaged in a general practice of stoking anti-Muslim hostility, often ineffectually trying to conceal it behind national security justifications.[73] They also noted that the Proclamation, as the direct descendant of Executive Orders 13769 and 13780,

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[68] "Donald Trump: 'I think Islam hates us'", Theodore Schleifer, CNN, (March 10, 2016) (https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html).
[69] *Id.*
[70] Meet the Press, "Meet the Press – July 24th, 2016", MSNBC. (https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706)
[71] *Id.*
[72] "Trump website takes down Muslim ban statement after reporter grills Spicer in briefing", Christine Wang, MSNBC (May 8, 2017) (https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html)
[73] Trump v. Hawaii, at 800.

was quite clearly within the scope of what the Trump advisor had called finding a way to "do it legal".[74]

These facts did not bear on its final determination, however. The Court instead relied on the "deferential standard of review" provided by *Kleindienst v. Mandel*.[75] In that case, the Court upheld the denial of a visa to a "radical Marxist" Belgian university professor against the challenge presented by American professors who claimed their right to receive information was violated by the Immigration and Nationalization Service's denial of his entry and thus his right to speak on college campuses.[76] They justified this with the notion that the President, granted great power in matters of national security, needed to be flexible to respond to changing global conditions.[77]

In *Trump v. Hawaii*, the Court's application of a modified version of the *Mandel* standard amounted to a functional avoidance of the intent question. The standard application of *Mandel* would evaluate if the policy is facially legitimate and "bone fide"; the Proclamation, which employed traditional procedures of national security review, would qualify.[78] However, owing to the history of animus the Court saw it as appropriate to "look behind" the Proclamation's facial legitimacy and conduct rational basis review.[79] Under this permissive standard, the only way of striking down the policy would be if it constituted a "bare desire to harm a politically unpopular group" – that is, was explicable only by the animus shown during the adoption of the policy.[80]

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[74] *Id.*
[75] *Id.* at 802.
[76] Kleindienst v Mandel, 408 U.S. 753, 769 (1972).
[77] *Id.* at 765.
[78] Trump v. Hawaii, at 2420.
[79] *Id.*
[80] *Id.* at 2421.

Because the policy did relate to national security concerns as found by the Department of Homeland Security review, it had a "legitimate purpose" apart from discrimination and was thus acceptable.[81]

The Court's approach represents consecutive side-steps away from the question of judging intent. The invocation of *Mandel*, rather than doing a traditional Establishment Clause heightened scrutiny analysis, means the deck was stacked in favor of the Proclamation. On the third attempt, the Executive had enough experience to craft a minimally persuasive facially-neutral justification for its policy. The reintroduction of rational basis scrutiny was a mere feint with the same effect – it seemed to acknowledge the relevance of the President's past statements (by providing justification to "look behind" the procedural legitimacy while replicating its deferential posture), for that procedure created a justification that meant the policy was not "inexplicable by anything but animus" as would be required to strike it down under rational basis review. Thus, the Court feinted towards concern about the illicit purpose while declining to balance or come to a judgment on its constitutional relevance to the challenged action.

b. The balanced approach of Washington v Davis

Washington v. Davis purported to be an extension of existing Equal Protection jurisprudence, with an intent requirement having always existed. Some commenters have cast doubt on this assertion, marking *Washington v. Davis* as a change in the Equal Protection line of cases.[82] Regardless, the case advanced the idea that to win an Equal Protection claim a plaintiff

[81] *Id.*
[82] *See* Eyer, *supra* note 58.

must show both discriminatory intent as well as discriminatory impact, subject to some exceptions like a *Yick Wo*-style dramatic disparity in enforcement.[83]

The case recommended the consideration of the "totality of the relevant facts" in the assessment of whether discriminatory intent existed.[84] Here, weighing on the side of finding the admission of Test 21 an equal protection violation was the disparity in pass rates between white and Black applicants. While disparate impact alone could not sustain an Equal Protection claim, it is "not irrelevant", and might "for all practical purposes demonstrate unconstitutionality" when the discrimination is "very difficult to explain on nonracial grounds".[85] Evidence in favor of treating the gap in pass rates as such included the fact that another qualification, the requirement of a high school diploma or its equivalent, acted as a pseudo-control for communications skills and reading comprehension, which the test purported to measure, leaving any gaps more likely the result of cultural biases.[86] Similar, too, was the lack of correlation between Test 21 results and job performance score – the lack of predictive utility for a catch-all metric (into which "communication skills" is surely factored) of effectiveness was evidence of possible illicit motive in the retention of the test.[87]

However, these factors were balanced by the DC Police Department's lack of evident discrimination and its demonstrated efforts to recruit and retain more Black officers. While the test was not a perfect measure of linguistic ability, it was clearly at least rationally related to the idea of promoting linguistic efficacy.[88] There was no evidence anywhere in the record that the

[83] Washington v. Davis, at 254.
[84] *Id.* at 242.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 246.
[88] *Id.*

test was maintained for any other purpose.[89] The Court credited the Department's recruitment of a more diverse selection of police officers from the city and its surrounding areas, noting that it made an active effort to enroll Black people into the trainee program.[90] It also factored in that these efforts were effective – the incoming class of officers approximately matched the racial demographics of the relevant geographic area for recruitment.[91] Taken together, these factors outweighed any potential inference of discriminatory intent, and thus the administration of Test 21 was upheld under the Equal Protection clause.

The balancing test, as well as the intent requirement applied in *Washington v. Davis*, has some advantages. One of them emphasized by the Court was the need for a simple limiting principle on claims based around disparate impact alone. Because of the correlation between race and socioeconomic status, any policy enacted that has a disproportionate effect on the poor – this is most of them – will also have a disparate racial impact as well.[92] While this is, of course, also the result of a long and persistent history of discrimination, it is possible to say that this is a matter too large for judicial rather than legislative resolution. The Court asserts as much: such broad-scale reform as might be catalyzed by an intent-blind rule should "await legislative prescription".[93] However, this impulse towards deference goes too far. Because nearly any government action is rationally related to a legitimate purpose, the acceptance of a proffered explanation, even when it seems unpersuasive compared to the other evidence, leads to the

[89] *Id.*
[90] *Id.* at 247.
[91] *Id.*
[92] *Id.* at 248.
[93] *Id.*

discrediting of claims of impact-based equal protection claims.[94] Courts should be cautious about extending this level of deference into new contexts.

c. West Lynn Creamery and taking Massachusetts's word for it

West Lynn Creamery seemed to proceed on normal Dormant Commerce Clause grounds. States are forbidden from imposing tariffs on the products of other states – indeed, any attempt to do this would be so "patently unconstitutional" that Supreme Court cases reveal "not a single attempt by any State to enact one".[95] Taxes that do not discriminate between states are constitutional, however, as are subsidies provided by a state to its local industries. Most of the Dormant Commerce Clause cases taken by the Court attempt to adjudicate the line between permissible taxes and subsidies and those that seek to gain the benefits of tariffs through such seemingly constitutionally tolerable means.[96] *Bacchus Imports*, the Hawaii liquor tax case struck down as a violation of the DCC, was found to operate exactly in this way: by creating a tax that exempted local liquor production and distribution at the expense of imported alcoholic beverages, the state created a functional tariff.[97]

The Court seemed to smoothly apply this principle in *West Lynn Creamery*. The tax was non-discriminatory; the money from the tax went to a fund specifically for subsidies; the subsidies were paid out directly to Massachusetts dairy farmers.[98] What's more, Massachusetts officials were on the record as to the protectionist aims of the tax and subsidy policy: because

[94] *See, e.g.*, Eyer, *supra* note 49.
[95] West Lynn Creamery, at 193.
[96] *Id.* at 194.
[97] Bacchus Imports, at 273.
[98] West Lynn Creamery, at 194.

"the industry was in serious trouble" they needed to "act on the state level to preserve the local industry" through the dairy equalization program.[99] Seems clear enough – they wanted to protect their local industry, and they did so through the imposition of requirements that raised the price of out-of-state goods relative to in-state goods: a tariff, not allowed any way you slice it.

But deeper analysis reveals the importance of the stated intent to bind the Court's reasoning together. The degree of proximity that would be required to mark the two independently-permissible actions as linked is not clear from the Court's opinion. What if, at the beginning of a state legislative session, lawmakers decided they needed a revenue-raising tax, which they decided to impose on sellers of milk, then at the end of the session realized that state dairy producers were flagging and wished to prop them up with a subsidy, both for the public health benefits of consistently-available nearby fresh milk and for the stimulus to the local economy created by dairy employment? What if two days elapsed between the independent passage of these programs? Two years? In his concurrence, Justice Scalia notes that in his view *West Lynn Creamery* was nearing the line of what the Dormant Commerce Clause could forbid, saying that in his view the exact scheme might have been allowable had the tax revenue gone directly into the public fisc rather than a special fund for subsidy payouts, under the theory that doing so would increase public demand (and thus legislative competition) for the money to be spent on other, non-protectionist, programs. Is this a verifiably correct model of state legislative behavior – do citizens exert democratic pressure on their representatives for optimal distribution of tax revenue? The statements of the legislators meant that these questions did not need to be

[99] *Id.* at 190.

resolved. Because the "avowed purpose" and "undisputed effect" of the setup was to function as a tariff, the Court could keep it simple.

IV. Argument

a. Courts should favor crediting parties' explicit declarations of intent in "purging the taint" scenarios

West Lynn Creamery left questions unanswered. The level of connection between two independent government actions that together function as a tariff remains unclear in the law. But its simplicity has its virtues: the state legislature declared its intention to do something unconstitutional, it did the unconstitutional thing, and the Supreme Court struck it down. The resolution of a different factual setup – an accidental tariff? A stealthier state legislature? – is best resolved in an individual case that presents those facts. Courts should react to what is in front of them.

This is especially important considering the strictures imposed by *Washington v. Davis*. The inability to find a violation of Equal Protection from effect alone, and the difficulty of proving intent in situations where the default rule is to assume the challenged state action was rationally related to a legitimate purpose, means Equal Protection cases are difficult to win, especially after the heightened requirements of *Feeney* and *Arlington Heights*. Courts may think these burdens of proof are required to prevent an explosion of disparate impact cases based on correlations between two characteristics – veteran status and maleness in *Feeney*[100], race and

[100] Feeney, at 260.

socioeconomic status in *Arlington Heights*.[101] Whether they are right is a subject for a different Note. It does seem clear, however, that if intent is going to be required, then clear, explicit evidence of discriminatory intent should not be allowed to be laundered through the passage of time or the application of some formal procedure with pre-ordained results.

Which is what makes *Trump v. Hawaii* alarming. This case had as many expressions of animus as it is perhaps possible to see – indeed, it might be understood as the outer bound of discrimination possible by a state actor. (In the majority opinion, Chief Justice Roberts chides the dissent for invoking *Korematsu*, which is a difficult criticism to render when the government official who proposed the policy and signed the Executive Orders and final Proclamation *himself* compared the proposal to Japanese internment).[102][103] Even despite this, the Court allowed for the policy to be implemented after it was run through the filters of official Department of Homeland Security process.

That the Court relied primarily on deference to the executive on matters of national security and immigration is little comfort. It has, at least tentatively, signaled its willingness to expand that willful blindness in other intent cases. In *Department of Commerce et. al. v. New York et. al*., the Court reviewed the Department of Commerce's proposed addition of a citizenship question to the once-a-decade Census and remanded to lower courts for further findings.[104] The stated rationale – to find out how many non-citizens were living in the country

[101] Arlington Heights, at 259.
[102] Trump v. Hawaii, at 2423.
[103] "Trump defends Muslim plan by comparing himself to FDR", Rebecca Kaplan, CBS News (December 8, 2015), (https://www.cbsnews.com/news/donald-trump-defends-muslim-plan-by-comparing-himself-to-fdr/)
[104] Department of Commerce v. New York, No. 18–966, 588 U.S. (2019)

for the purpose of effective enforcement of the Voting Rights Act – was found to be a pretext.[105] The real intent of the policy, based on the public statements of the involved parties, was to lower the census response rates of immigrants and non-white individuals through the implied threat of deportation (that would seem to attend any undocumented person marking "non-citizen" on any form that is an official government document).[106] While the Court's reluctance to accept the initial pretext seemed to be a positive development, it hinted at a willingness to ignore intent in the future.[107] The defense-of-the-Voting Rights Act justification was absurd on its face – the Secretary of Commerce had been designing this plan since his first week in office, and his materials betrayed no indication that effective enforcement of seminal voting rights legislation was on his mind.[108] The decision to remand rather than simply deny the proposed question, some commentators have argued, was essentially a decision to permit the Secretary a chance to concoct a more persuasive, effective, untruth.[109]

Sticking to a *West Lynn Creamery* framework of making intent count seems preferable to allowing multiple bites at the apple for laundering illicit motivation. Doing so prevents potential movement away from enforcement of Equal Protection principles even greater than has already happened following *Washington v. Davis* and its progeny, and avoids the problem that those cases sought to head off at the pass. An intent-strict analysis of *Trump v. Hawaii* allows for courts to recognize the obvious: that actions taken from a place of obvious animus should not be

[105] *Id.*
[106] *See* Dorf, *supra* note
[107] *Id.*
[108] Department of Commerce v. New York (2019).
[109] *See* Dorf, *supra* note

photocopied into legitimacy by the passage of time. The Muslim ban remains the Muslim ban no matter how often the Secretary of Homeland Security is called into action to write a report.

V. Conclusion

Analysis of intent has seen its place shift over the past 45 years of constitutional law. *Washington v. Davis* and its successor cases made its proof mandatory for nearly every claim of a violation of Equal Protection by a facially neutral law. It has remained a major part of Dormant Commerce Clause jurisprudence during that time. And courts have started to think harder about what must be done to "purge the taint" of illicit intent when it coats a challenged action.

Each of the different cases examined took a different approach to its intent analysis. The Court in *Washington v. Davis* took a deferential, balancing view, finding that while the policy of administering a Civil Service Department communications test produced racially inequitable results while not directly predicting job performance, the other diversity-promoting actions of the city police department meant that intent cannot be inferred from the retention of that policy. In *West Lynn Creamery*, the Court struck down a scheme that implemented an otherwise-permissible facially neutral tax and an otherwise-permissible subsidy to in-state milk producers on the grounds that the stated intent of the legislature was to create the functional equivalent of a tariff, in the process neglecting important questions of when similar schemes would be allowed. And in *Trump v. Hawaii*, the Court declined to factor into its analysis the reams of evidence that the challenged Presidential Proclamation was motivated by religious bigotry, instead affording the Executive great deference in the realm of national security.

Going forward, courts should adopt a more strict analysis of intent when the history of the challenged regulation contains explicit evidence of animus. Doing so would seem to avoid the strange situation, seemingly possible under current doctrine, where intent can be deemed irrelevant and the taint sufficiently purged more easily in cases that deal with core liberties (like the Establishment Clause) than with a protectionist tax measure designed to prop up a stalling local industry. Doing so would not threaten a superabundance of litigation, as was the worry in *Washington v. Davis*, while allowing for the preservation of Equal Protection and other rights in a legal climate increasingly foreboding for their claims. If public officials are going to take credit for their policies, they must take accountability for their statements.

Applicant Details

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Date of BA/BS	**May 2014**
JD/LLB From	**Notre Dame Law School** **http://law.nd.edu**
Date of JD/LLB	**May 18, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Notre Dame Journal of Law, Ethics, and Public Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at Notre Dame Law School. I am writing to apply for a clerkship in your chambers beginning in 2024.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. You will receive letters of recommendation from Professor James Kelly of Notre Dame Law School, Professor Michael Kirsch of Notre Dame Law School, and the Honorable Judge Michael McAuliffe.

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,
Clifford Perez

Clifford J. Perez

7519 Bradley Boulevard | Bethesda, MD 20817 | cperez24@nd.edu | (845) 853-2529

EDUCATION

University of Notre Dame Law School — Notre Dame, IN
Juris Doctor Candidate — May 2024
GPA: 3.53

- Honor Roll: Fall 2022; Spring 2023
- Notre Dame Journal of Law, Ethics, and Public Policy – Managing Senior Editor
- Community Development Clinic, Spring 2023
- Space Law Society – President
- Galilee Public Interest Immersion Program
- First Generation Professionals

The Catholic University of America — Washington, DC
Bachelor of Science in Business Administration in Economics, cum laude — May 2014
GPA: 3.67

- The Henry Spiegel Award for Outstanding Academic Achievement in Economics
- Dean's List: 2010–2014
- Pi Gamma Mu: International Honors Society in Social Sciences
- Phi Eta Sigma: National Honor Society
- Catholic University Men's Rugby Team – President

EXPERIENCE

Carlton Fields — Washington, DC
Summer Associate — May 2023 – Present

- Draft legal memorandums for client matters on topics such as: the use of predecessor audit reports in current financial statements; broker-dealer's financial duties in California; and the statutes of limitations for various securities claims
- Review and analyze complaints and answers from ongoing cases
- Assist attorneys in litigation and transactional matters

Montgomery County Circuit Court, 6th Judicial Circuit — Rockville, MD
Judicial Intern for the Honorable Judge Michael J. McAuliffe — May 2022 – July 2022

- Provided legal research for criminal, civil and procedural matters, including the admissibility of hearsay evidence in probation hearings, patient privilege for prison psychologists and compensation of trust auditors
- Assisted in jury selection, hearings, and other trial preparation activities
- Created hearing preparation reports which summarize case history, the parties' positions, cited laws and other applicable laws

The Concourse Group LLC — Annapolis, MD
Senior Analyst — April 2016 – August 2021

- Created a comprehensive housing asset report for the House Arms Subcommittee
- Managed all technical responses to facilitate the federal government's needs on military housing and to ensure proper management of federal government assets

Economic Analyst & Field Program Manager

- Conducted quantitative research, economic modeling and technical reporting to develop master plans, inventory assessments and economic analyses for US Army housing
- Managed and led onsite assessments of US military housing to verify existing housing information
- Developed technical responses for government contract proposals

INTERESTS/AWARDS: Rugby; Camping; Guitar; Eagle Scout

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Major: Law

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UNIVERSITY OF NOTRE DAME CREDIT:													
Fall Semester 2021													
Law School													
LAW	60105	Contracts	4.000	B+	13.332								
LAW	60302	Criminal Law	4.000	B+	13.332								
LAW	60703	Legal Research	1.000	B	3.000								
LAW	60705	Legal Writing I	2.000	B+	6.666								
LAW	60901	Torts	4.000	B-	10.668								
			Total		46.998	15.000	15.000	15.000	3.133	15.000	15.000	15.000	3.133
Spring Semester 2022													
Law School													
LAW	60307	Constitutional Law	4.000	B+	13.332								
LAW	60308	Civil Procedure	4.000	B+	13.332								
LAW	60707	Legal Resrch & Writing II-MC	1.000	B+	3.333								
LAW	60906	Property	4.000	B+	13.332								
LAW	70318	Legislation & Regulation	3.000	B+	9.999								
LAW	75700	Galilee	1.000	S	0.000								
			Total		53.328	17.000	17.000	16.000	3.333	32.000	32.000	31.000	3.236
Fall Semester 2022													
Law School													
LAW	70101	Business Associations	4.000	A	16.000								
LAW	70605	Federal Income Taxation	3.000	A	12.000								
LAW	70903	Military Law	2.000	A-	7.334								

CONTINUED ON PAGE 2

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LAW	73136	Cybersecurity & Data Protect.	2.000	A	8.000								
LAW	75710	Intensive Trial Ad	4.000	S	0.000								
LAW	75751	Journal Law/Ethics/Public Pol	1.000	S	0.000								
			Total		43.334	16.000	16.000	11.000	3.939	48.000	48.000	42.000	3.420
Honor Roll													
Spring Semester 2023													
Law School													
LAW	70107	Securities Regulation	3.000	A-	11.001								
LAW	70111	Real Estate Transactions	3.000	A-	11.001								
LAW	70807	Professional Responsibility	3.000	A-	11.001								
LAW	75721	Community Development Clinic I	5.000	A	20.000								
LAW	75751	Journal Law/Ethics/Public Pol	1.000	S	0.000								
LAW	76101	Directed Readings	2.000	A	8.000								
			Total		61.003	17.000	17.000	16.000	3.813	65.000	65.000	58.000	3.529
Honor Roll													
Fall Semester 2023													
IN PROGRESS WORK													
LAW	74411	LE Law of International Finance	3.000	IN PROGRESS									
LAW	74412	LE Crypto, Blockchain & Finance	2.000	IN PROGRESS									
LAW	74425	LE Business and Human Rights	2.000	IN PROGRESS									
LAW	74433	LE Law of International Trade	3.000	IN PROGRESS									
LAW	74741	LE Journal Law Ethics Pub Policy	1.000	IN PROGRESS									
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NOTRE DAME	Ehrs:	65.000	QPts:	204.663
	GPA-Hrs:	58.000	GPA:	3.529
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	65.000	QPts:	204.663
	GPA-Hrs:	58.000	GPA:	3.529

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LA London, England (Fall/Spring)
LE London, England (Law-JD)
LG London, England (Summer EG)
LS London, England (Summer AL)
PA Perth, Australia
PM Puebla, Mexico
RE Rome, Italy
RI Rome, Italy (Architecture)
SC Santiago, Chile
SP Toledo, Spain

For a complete list of codes, please see the following website:
http://registrar.nd.edu/pdf/campuscodes.pdf

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Previous grading systems as well as complete explanations are available at the following website:
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Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.
I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V Auditor (Graduate students only).
W Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P Pass in a course taken on a pass-fail basis.
NR Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

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The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

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Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).
The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX = Pre-College course
ENGL 1 X - XXX = Freshman Level course
ENGL 2 X - XXX = Sophomore Level course
ENGL 3 X - XXX = Junior Level course
ENGL 4 X - XXX = Senior Level course
ENGL 5 X - XXX = 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX = 1st Year Graduate Level Course
ENGL 7 X - XXX = 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX = 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX = Upper Level Graduate Level Course

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UNDERGRADUATE TRANSCRIPT

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DEGREES COMPLETED

BSBA 05/17/2014
Bachelor of Science in Business Administration
Major: Economics
GPA: 3.67
Honors: Cum Laude

TERM HISTORY

Term: Fall 2010: 8/30/2010 - 12/18/2010
Program: Arts & Sciences
Plan: Economics - BSBA

ART	211	History of Art : Prehist-MAges	3.00 B+
ECON	101	Prin of Macroeconomics	3.00 A
ENG	101	Writing: Logic and Rhetoric	3.00 A-
PHIL	201	The Classical Mind	3.00 A-
PSY	201	General Psychology	3.00 A

Ernd: 15.00
GPA Hrs: 15.00 GPts: 56.10 GPA: 3.740
Cum Earned Hours: 15.00 Cum GPA Hrs: 15.00
Cum Grade Pts: 56.10 Cum GPA: 3.740

Term: Spring 2011: 1/10/2011 - 5/7/2011
Program: Arts & Sciences
Plan: Economics - BSBA

ART	304	Painting II	3.00 A
ECON	102	Prin of Microeconomics	3.00 A
MGT	218	Microcomputer Bus Applications	3.00 A
PHIL	202	The Modern Mind	3.00 A-
TRS	201	Faith Seeking Understanding	3.00 A

Ernd: 15.00
GPA Hrs: 15.00 GPts: 59.10 GPA: 3.940
Cum Earned Hours: 30.00 Cum GPA Hrs: 30.00
Cum Grade Pts: 115.20 Cum GPA: 3.840

Term: Fall 2011: 8/29/2011 - 12/17/2011
Program: Arts & Sciences
Plan: Economics - BSBA

FREN	103	Intermediate French I	3.00 A-
MATH	111	Calculus for Social-Life Sci I	3.00 A
MGT	240	Management of Information	3.00 A
MGT	298	Career Development Seminar	NG
MGT	323	Management - Theory & Practice	3.00 A
TRS	398	Introduction to Islam	3.00 A-

Ernd: 15.00
GPA Hrs: 15.00 GPts: 58.20 GPA: 3.880
Cum Earned Hours: 45.00 Cum GPA Hrs: 45.00
Cum Grade Pts: 173.40 Cum GPA: 3.853

Term: Spring 2012: 1/9/2012 - 5/5/2012
Program: Arts & Sciences
Plan: Economics - BSBA

ACCT	305	Intro Accounting	3.00 B+
ENG	327	Argumentative Writing	3.00 A
FREN	104	Intermediate French II	3.00 B
MATH	112	Calculus for Social-Life Sc II	3.00 B
PHIL	351	Introduction to Symbolic Logic	3.00 A

Ernd: 15.00
GPA Hrs: 15.00 GPts: 51.90 GPA: 3.460
Cum Earned Hours: 60.00 Cum GPA Hrs: 60.00
Cum Grade Pts: 225.30 Cum GPA: 3.755

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ID: **2387853**

Printed: 7/10/2014 ISSUED TO STUDENT
OFFICIAL

Term: Fall 2012: 8/27/2012 - 12/15/2012
Program: Arts & Sciences
Plan: Economics - BSBA

ECON	223	Statistics for Business & Econ	3.00	A
ECON	241	Intermed Macroeconomic Theory	3.00	A-
ENG	351	Chaucer and His Age I	3.00	B
MGT	301	Ethics in Business and Econ	3.00	A
MGT	345	Marketing Management	3.00	B

Ernd: 15.00
GPA Hrs: 15.00 GPts: 53.10 GPA: 3.540
Cum Earned Hours: 75.00 Cum GPA Hrs: 75.00
Cum Grade Pts: 278.40 Cum GPA: 3.712

Term: Spring 2013: 1/14/2013 - 5/11/2013
Program: Arts & Sciences
Plan: Economics - BSBA

ACCT	306	Introductory Managerial Acctg	3.00	B+
ECON	242	Intermed Micro Theory	3.00	C+
ENG	381	Poetry Rock: Age Dickey/Dylan	3.00	A
MGT	226	Financial Management	3.00	A-
MGT	349	Personal Selling	3.00	A

Ernd: 15.00
GPA Hrs: 15.00 GPts: 51.90 GPA: 3.460
Cum Earned Hours: 90.00 Cum GPA Hrs: 90.00
Cum Grade Pts: 330.30 Cum GPA: 3.670

Term: Fall 2013: 8/26/2013 - 12/14/2013
Program: Business & Economics
Plan: Economics - BSBA

ECON	348	Industrial Organization	3.00	B+
ECON	463	Principles of Econometrics	3.00	A
MGT	100	Supercurriculum Lectures		
MGT	371	Gov't Regulation of Business	3.00	A-
MGT	372	Entrprnshp & Cap Venturing	3.00	A-
MGT	499	Career Development Seminar		NG
TRS	320A	Reform, Reformation, Renewal	3.00	A

Ernd: 15.00
GPA Hrs: 15.00 GPts: 56.10 GPA: 3.740
Cum Earned Hours: 105.00 Cum GPA Hrs: 105.00
Cum Grade Pts: 386.40 Cum GPA: 3.680

Term: Spring 2014: 1/13/2014 - 5/10/2014
Program: Business & Economics
Plan: Economics - BSBA

DR	206	Acting I	3.00	B+
ECON	327	Sports Economics	3.00	A-
ECON	359	Public Finance	3.00	A-
ECON	540	Economics of Development	3.00	A
MGT	475	Business Strategy	3.00	B+
MGT	498	Undergraduate Comps		P

Ernd: 15.00
GPA Hrs: 15.00 GPts: 54.00 GPA: 3.600
Cum Earned Hours: 120.00 Cum GPA Hrs: 120.00
Cum Grade Pts: 440.40 Cum GPA: 3.670

Page: 3

Julie Isha, University Registrar

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Name: **Perez,Clifford J**
ID: **2387853**

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UNDERGRADUATE TRANSCRIPT

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CUA Credits:	120.00
Transfer Credits Not Included in GPA:	.00
Test Credits:	.00
Other Credits:	.00
Total Credits Earned:	120.00
GPA Hours:	120.00
Total Grade Points:	440.40
Cumulative GPA:	3.670

End of Transcript

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Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, Indiana 46556

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Clifford (Cliff) Perez for a clerkship in your chambers. As brief background, I am a tenured Professor of Law at Notre Dame Law School, where my teaching and scholarship focus on tax law and policy. Earlier in my career, after four years at a large Los Angeles law firm, I served a two-year clerkship for Chief Judge Lapsley W. Hamblen, Jr., of the U.S. Tax Court, and also had other government service in Washington, DC, including a position as the Associate International Tax Counsel in the Treasury Department's Office of Tax Policy.

Cliff is a responsible and intelligent student who, I believe, would make a valuable addition to your chambers. I first met Cliff during the Fall 2022 semester when he was a student in my introductory Federal Income Tax class, a course with a heavy emphasis on reading statutes and regulations. The relatively large class size did not offer significant opportunities for interaction, although Cliff was well-prepared when called on. More importantly, he performed extremely well on the comprehensive final exam. Cliff's score was in the top 5 in a class of approximately 50 students. In preparing this recommendation, I looked back at his exam and noted one particularly noteworthy item. In one question, I asked students to explain whether the tax consequences of a particular transaction were consistent with the overall economic consequences to the taxpayer. Students often have trouble with this type of question, as it requires them to step back from a rote application of legal rules and instead consider the practical implications, a type of analysis that cannot be memorized or put into an outline in advance. Cliff was one of only a very small number of students who was able to make this conceptual jump, providing a clear and accurate explanation.

In addition to taking this introductory tax law class, Cliff asked me to supervise a Directed Reading (i.e., an independent research and writing project) during the Spring 2023 semester. Cliff was proactive in choosing a topic that aligned with his interest in business and economics. His well-written paper analyzed and critiqued the recently enacted corporate alternative minimum tax, concluding that it is an ineffective, overbroad solution to a perceived problem, and that Congress should instead enact more targeted fixes. Cliff demonstrated initiative and self-management in this project, requiring only limited involvement by me. After brainstorming possible topics with me, he tracked down a range of sources on his own and created a well-developed outline for my approval. He then turned that outline into a near-complete draft without any significant further input from me. In short, he has the ability to research and produce quality written work with only limited guidance or supervision.

Finally, I offer a few thoughts to put Cliff's overall law school performance in perspective. His 1L grades were good, although not great, with his 3.24 cumulative 1L GPA slightly below the overall 3.32 cumulative GPA of his classmates. However, his very strong performance during 2L year (3.94 and 3.81 in Fall and Spring, respectively) brought his cumulative GPA (3.53) well above the 3.36 cumulative GPA of his classmates in the Class of 2024.

In summary, Cliff is a bright and responsible student who is able to produce quality written work with only limited guidance. From a personal perspective, Cliff has always impressed me as a friendly and respectful person who would get along well with other clerks and staff in chambers. Accordingly, I am happy to recommend Cliff for a clerkship

If you have any questions, feel free to contact me.

Sincerely,

Michael S. Kirsch
Professor of Law

Michael Kirsch - mkirsch@nd.edu - 574-631-5582

Clifford Perez – Writing Sample I

THE CORPORATE ALTERNATIVE MINIMUM INCOME TAX: AN OLD SOLUTION FOR AN OLD PROBLEM

*Clifford J Perez**[1]

In 2022 Congress passed the Inflation Reduction Act. Part of this legislation reinstated the corporate alternative minimum tax (CAMT). The CAMT is not the first legislation of its kind, but unlike the previous versions, the new CAMT is based on the book value of the corporation. The CAMT was proposed to make billion-dollar corporations which had zero federal income taxes reported in their book income pay their fair share of taxes. A secondary purpose of the CAMT is the imposition of a tax targeted at increasing tax revenue generated from corporations. While many benefits were proposed for the CAMT, it fails to address the underlying problem with the tax code—the tax expenditures allowing some of these corporations, and many non-billion-dollar companies, to pay no federal income tax. The CAMT is an ineffective solution to addressing underlying problems in expenditures in the tax code. Congress should work towards drafting and revising better tax policy instead of using old tactics to resolve an old problem.

Table of Contents

[1] * Clifford Perez wrote this paper for his Spring 2023 Directed Reading for Professor Kirsch.

Clifford Perez – Writing Sample I

INTRODUCTION

The previous corporate alternative minimum tax (CAMT) was removed by the Tax Cuts and Jobs Act (TCJA) of 2017.[2] In August of 2022 Congress passed the Inflation Reduction Act which included legislation to reinstate a CAMT.[3] The new CAMT was reinstated with the purpose of making billion-dollar companies pay their "fair share" of taxes, since some companies that were reporting billions of dollars in revenue on their financial statements were reporting little to no income tax in their financial records.[4]

This paper will look at the CAMT which was passed as part of the Inflation Reduction Act. The first part of the paper will provide a history of the CAMT. The second part of the paper will examine the contours of the CAMT, including how it works and which companies it applies to. The third section will examine the reasoning behind passing the CAMT. The fourth section will discuss an outstanding problem with the CAMT, specifically that it transfers some of Congress's power to an unelected, non-governmental agency. The final part will examine the effectiveness of implementing the CAMT.

[2] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2083.
[3] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 135 Stat. 1818.
[4] *See* Matthew Gardner & Steve Wamhoff, *55 Corporations Paid $0 in Federal Taxes on 2020 Profits*, ITEP 1 (Apr. 2021).

Clifford Perez – Writing Sample I

I. A BRIEF HISTORY

The CAMT passed within the Inflation Reduction Act is just the latest in a serious CAMTs that have been enacted in the United States. Before analyzing the new CAMT, a brief history of CAMTs is needed.

a. National Corporate Minimum Taxes Until 2017

The first corporate tax was passed in the Revenue Act of 1894[5] but was soon found to be unconstitutional.[6] Yet, support for an income tax continued and in 1909 a corporate excise tax was passed by the Senate and House with a proposal for a constitutional amendment "empowering Congress to levy [an] income tax."[7] The proposed amendment would become the sixteenth amendment after its ratification in 1913.[8] A corporate tax has been in effect ever since.[9]

The first federal AMT, and federal corporate minimum tax, was not passed until 1969 in the appropriately named Tax Reform Act of 1969.[10] The 1969 Act was a substantive and comprehensive reform of the internal revenue code (IRC).[11] The 1969 Act imposed an add-on

[5] Jack Taylor, *Corporation Income Tax Brackets and Rates, 1909-2002*, STAT. INCOME BULL. (IRS), Fall 2003 at 284. While the Civil War income tax did tax "the gains and profits of all companies" they were included in the individual taxpayer's income as a sort of "pass-through taxation." Reuven S. Avi-Yonah, *Why Was the U.S. Corporate Tax Enacted in 1909?*, *in* STUDIES IN HISTORY OF TAX LAW VOL. 2, 377–92, 377–78 (John Tiley ed., 2007); quoting Act of 30 June 1864, ch. 173, § 117, 13 Stat. 223, 281–282 (repealed 1874).
[6] Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895); Publication 1136. (Rev. 12-03).
[7] Avi-Yonah, *supra* note 5 at 380–81.
[8] National Archives, *16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, National Archives (last reviewed Sept. 13, 2022) https://www.archives.gov/milestone-documents/16th-amendment#:~:text=Passed%20by%20Congress%20on%20July,impose%20a%20Federal%20income%20tax. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.
[9] Taylor, *supra* note 5 at 284.
[10] *See* Patrick Fleenor & Andrew Chamberlain, *Backgrounder on the Individual Alternative Minimum Tax (AMT)*, TAX FOUND. (May 24, 2005) https://taxfoundation.org/backgrounder-individual-alternative-minimum-tax-amt/; *see also* John M. Janiga, *The Corporate Alternative Minimum Tax: A Critique and Exploration of Alternatives*, 20 LOY. U. CHI. L.J. 21, 22 n.4 (1988).
[11] Joint Committee Report JCS-16-70: General Explanation of the Tax Reform Act of 1969 (Dec. 3, 1970) (the House and Senate Committee reports suggested that "there was no prior tax reform bill of equal substantive scope).

minimum tax to "both individuals and corporations."[12] The AMT was introduced because several high-income taxpayers paid zero federal income tax by using available deductions and tax credits.[13] The AMT was an add-on tax to fix the purported problem.[14] "Rather than directly addressing the problem by eliminating the deductions and credits in the tax code that were leading to the tax avoidance, Congress laid an additional layer of complexity over the regular income tax in the form of the AMT."[15]

In 1986, another appropriately named act, the Tax Reform Act of 1986, made more extensive changes to the IRC, including the imposition of the CAMT that stood until its repeal in 2017.[16] The 1986 Act removed the add-on minimum tax created by the 1969 Act and in its place imposed a new CAMT based on income.[17] Initially the CAMT was based on the book value—similar to the current version of the CAMT—but this version only lasted until 1989.[18] The 1986 CAMT eventually became "a flat [twenty percent] tax imposed on a corporation's alternative minimum taxable income less an exemption amount."[19] The alternative minimum taxable income was based on the corporation's taxable income with adjustments for deprecation, and

[12] *Id.* The add on tax was ten percent of the total "tax preferences received by the taxpayer less thirty-thousand dollars and the taxpayer's regular federal income tax." *Id.*
[13] Fleenor & Chamberlain, *supra* note 10. The taxpayers had a gross income around $200 thousand, roughly $1.75 million today. *Id.*; AIER, *Cost of Living Calculator: What is Your Dollar Worth Today?*, AIER (accessed Apr. 4, 2023) https://www.aier.org/cost-of-living-calculator/?utm_source=Google%20Ads&utm_medium=Google%20CPC&utm_campaign=COLA&gclid=Cj0KCQjwi46iBhDyARIsAE3nVrYaFGHuQyux22P69R-oxkZi7qDNqGtNyjsX-3AhgHMG9wWpzb1lSy8aArLqEALw_wcB.
[14] *Id.*
[15] Fleenor & Chamberlain, *supra* note 10.
[16] Tax Reform Act of 1986, Pub. L. No. Tax Reform Act of 1986 99–514 100 Stat 2085 [hereinafter 1986 Act]; *see infra* Part II(b) for a discussion of the repeal of the CAMT by the Tax Cuts and Jobs Act of 2017.
[17] Donald J. Marples, *Tax Reform: The Alternative Minimum Tax*, CONG. RSCH. SERV. 1 (updated Dec. 4, 2017).
[18] *See* Jasper L. Cummings, Jr., *The 2022 Corporate AMT*, TAX NOTES (Sep. 26, 2022) https://www.taxnotes.com/special-reports/alternative-minimum-tax/2022-corporate-amt/2022/09/23/7f5rg.
[19] *Id.* The 1986 CAMT actually started as a book value but was abandoned after a three-year tenure. *Id.*

other items, along with an increase for certain disallowances.[20] The CAMT was only applicable if it was larger than the regular tax.[21]

The CAMT was passed with the objective of making sure "that no taxpayer with substantial economic income [could] avoid significant tax liability by using exclusions, deductions, and credits."[22] The CAMT was designed to tax corporations that some Congressional Representatives felt were receiving "too much advantage of the very incentives designed to induce taxpayers to act in Congressionally approved ways."[23] Instead of fixing the tax incentives, Congress opted to implement a CAMT.

b. The Tax Cuts and Jobs Act

The TCJA was passed into law in 2017.[24] It was passed as a "pro-growth reform" claiming to "significantly lower[] marginal tax rates and cost of capital."[25] It was another major overhaul of the IRC.[26] Subtitle B of the TCJA contained one of the major reforms; repealing the existing CAMT.[27] The drafters of the TCJA wanted to increase corporate competitiveness and promote economic development.[28] The repeal of the CAMT was one of the proposed methods of achieving this goal.[29] Another reason was that "[t]he repeal of the AMT for corporations was primarily a result of the historic underlying policy for its implementation being greatly

[20] *Id.* There was also a special deduction for some insurance companies. *Id.*
[21] *Id.*
[22] Daniel L. Simmons, *The Tax Reform Act of 1986: An Overview*, 1987 BYU L. REV. 151, 192 (1987).; *quoting* S. Rep. No. 144, 97th Cong., 1st Sess., 25-26 (1981).
[23] Simmons, *supra* note 22 at 193. "The [senate] report adds that, 'Although these provisions provide incentives for worthy goals, they become counter-productive when individuals are allowed to use them to avoid virtually all tax liability.'" *Id.* at 193 n.195 (also citing several other reports with identical language); *quoting* S. REP. No. 144, *supra* note 22.
[24] *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2083.
[25] Tax Foundation, *Tax Cuts and Jobs Act (TCJA)*, TAX FOUND. (accessed Apr. 30, 2023) https://taxfoundation.org/tax-basics/tax-cuts-and-jobs-act/.
[26] *Id.*
[27] *Id.*
[28] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2083.
[29] *Id.*

diminished, when the [C]AMT was generally applied at a [twenty percent] rate and the new flat corporate rate is [twenty-one percent]."[30] Though it is likely that the long standing criticism of the CAMT played a part.[31]

c. The Inflation Reduction Act

In 2021 a study discussed how fifty-five of the largest corporations in the United States did not pay income taxes in 2020[32] causing President Biden, and other lawmakers, to call for the reinstatement of the CAMT.[33] A proposed CAMT was put into the Inflation Reduction Act. The Inflation Reduction Act is a broad-based legislation which covered combating climate change, lowering health-care costs, raising taxes on "some billion-dollar corporations"—the reintroducing the CAMT—and reducing the federal deficit as part of President Biden's economic agenda.[34] On August 16, 2022, the Inflation Reduction Act was passed into law with a reinstated CAMT.[35] This CAMT is described in the next section.

II. CONTOURS OF THE MINIMUM CORPORATE TAX

Section 55 of the IRC imposes both corporate and non-corporate alternative minimum taxes (AMTs).[36] Prior to the Inflation Reduction Act, section 55 did not apply to taxpayers that were corporations.[37] The Inflation Reduction Act modified the text of section 55 of the IRC—along

[30] § 3:83. Disadvantages—Alternative minimum tax, 1 La. Prac. Corp. § 3:83 (2022-2023 ed.)
[31] *See generally* Terrence R. Chorvat & Michael S. Knoll, *The Case for Repealing the Corporate Alternative Minimum Tax*, 56 SMU L. REV. 305 (2003).
[32] Gardner & Wamhoff, *supra* note 4 at 1.
[33] *See* White House, *The Biden-Harris Economic Blueprint*, WHITE HOUSE 55 n.149 (Sept. 2022); see also Staff, *Tax Dodgers: How Billionaire Corporations Avoid Paying Taxes and How to Fix It*, Office of Senator Elizabeth Warren 1 n.2 (Nov. 2021).
[34] Tony Romm, *Senate approves Inflation Reduction Act, clinching long-delayed health and climate bill*, WASHINGTON POST (Aug. 7, 2022) https://www.washingtonpost.com/us-policy/2022/08/07/senate-inflation-reduction-act-climate/.
[35] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 135 Stat. 1818.
[36] *See* I.R.C. § 55.
[37] *See* I.R.C. § 55 (2019) (applying to taxpayers other than corporations).

with sections 11, 12, 38, 53, 59, 860 897, 882, 6425, 6655—to reintroduce a CAMT.[38] The Inflation Reduction Act also added a new section 56A to the IRC to define the adjusted financial statement used in conjunction with the new CAMT.[39] This section will look at the CAMT Congress created through the Inflation Reduction Act, how the CAMT is set up to work, what corporations the CAMT applies to, when the CAMT goes into effect, how the new CAMT differs from the previous versions of the CAMT, and why the CAMT was reinstated.

a. What is the Corporate Alternative Minimum Tax

Put simply, an AMT is a tax imposed in addition to regular taxes taxpayers pay for specified taxpayers.[40] Existing tax laws allow for some individuals and corporations to significantly reduce their tax liability through deductions, exemptions, and other tax benefits.[41] AMTs are an attempt to make sure that "taxpayers pay at least a minimum amount of tax."[42] AMTs only comes into effect if the regular amount of taxes is less than the taxpayers tentative minimum tax for the year.[43] If the tentative minimum tax is higher than the taxpayers regular tax, the difference is imposed on the taxpayer.[44] The CAMT is the AMT that applies to certain corporations.[45]

b. How it Works

The CAMT is the excess of "the tentative minimum tax for the taxable year" minus "the regular tax for the year plus, in the case of an applicable corporation, the tax imposed by section

[38] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 135 Stat. 1818.
[39] *Id.*
[40] I.R.C. § 55.
[41] IRS, *Topic No. 556, Alternative Minimum Tax*, IRS (last updated Apr. 6, 2023) https://www.irs.gov/taxtopics/tc556.
[42] *Id.*
[43] *See* I.R.C. § 55(a). For some corporations, the tax imposed by Section 59A of the IRC is added to the regular tax. *Id.*
[44] *Id.*
[45] I.R.C. § 55(b)(2).

59A."[46] Thus, to calculate the AMT, a taxpayer would need to know what the tentative minimum tax is, what their regular tax is, and, if applicable their section 59A tax liability.

i. Tentative Minimum Tax

The tentative minimum tax for the taxable year for corporations is the amount in surplus of "[fifteen] percent of the adjusted financial statement income for the taxable year" minus "the [CAMT] foreign tax credit (FTC) for the taxable year."[47]

The adjusted financial statement income is "the net income or loss of the taxpayer set forth on the taxpayer's applicable financial statement for such taxable year" with additional adjustments.[48] Instead of looking at a corporation's regular taxable income, the tentative minimum tax looks at the income presented on applicable financial statements. An applicable financial statement is a "financial statement which is certified as being prepared in accordance with generally accepted accounting principles" and are: a 10-K or annual statement to shareholders filed with the Securities and Exchange Commission (SEC); an audited financial statement for credits purposes, reporting purposes, or other substantial nontax purposes; or, barring the first two, "filed by the taxpayer with any other Federal agency for purposes other than Federal tax purposes."[49] If none of these financial statements are available, a financial statement filed with a foreign equivalent with the same or higher requirements as the SEC is applicable.[50] If both of those types of financial statements are unavailable, any financial

[46] I.R.C. § 55(a). The AMT only applies if there is an excess found under section 55. *Id.* In other words, it cannot be used to reduce the taxpayers tax liability if the tentative minimum tax is smaller than the regular tax plus the section 59A tax. The only result of such a case would be that no AMT is paid by the taxpayer.
[47] I.R.C. 55(b)(2)(A). Section 55 provides a different tentative minimum tax for noncorporate taxpayers. *See* I.R.C. 55(b)(1).
[48] I.R.C. § 56A(a).
[49] I.R.C. 451(b)(3)(A).
[50] I.R.C. 451(b)(3)(B).

statement filed with any other regulatory or governmental agency is applicable.[51] Financial statement income can be negative if a corporation "realizes a loss."[52]

Financial statement income is used to determine the "profitability of a company."[53] It is designed to provide a look into the financials of a corporation and includes the income, "costs including depreciation of assets," and provides a profit or loss on an after-tax basis.[54] Financial statements are produced by determining what "[i]ncome and deductions are in accordance with Generally Accepted Accounting Principles (GAAP) as set by the Financial Accounting Standards Board [(FASB)], and financial disclosures for public companies are filed with the [SEC], including an annual 10-K report."[55] GAAP is a "set of accounting rules, standards, and procedures" that United States corporations must use in the creation of financial statements.[56] The FASB is an "independent, private- sector, not-for-profit organization . . . that establishes financial accounting and reporting standards for public and private companies and not-for-profit organizations that follow [GAAP]."[57] The financial statement income can be "useful for assessing the financial health of a business but often does not reflect economic reality and can result in a firm appearing profitable" even while the corporations regular income tax is relatively low or non-existent.[58]

Further adjustments are made to the financial statement income to calculate the tentative minimum tax. These adjustments include several methods of making the financial statements

[51] I.R.C. 451(b)(3)(C).
[52] Jane G. Gravelle, *The 15% Corporate Alternative Minimum Tax*, CONG. RSCH. SERV., 2 (Jan. 19, 2023).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Jason Fernando, *GAAP: Understanding It and the 10 Key Principles*, INVESTOPEDIA (updated June 28, 2022) https://www.investopedia.com/terms/g/gaap.asp.
[57] FASB, *About The FASB*, FASB 1 (Apr. 2023) https://www.fasb.org/document/blob?fileName=About_the_FASB_(4-23).pdf.
[58] Tax Foundation, *Book Income*, TAX FOUND. (accessed Apr. 10, 2023) https://taxfoundation.org/tax-basics/book-income-vs-tax-income/.

closer to the regular tax. One adjustment modifies the financial statement if it "covers a period other than the taxable year."[59] Another adjustment adds back in federal tax and FTC excluded from the financial statement income.[60] There are also several adjustments for specific types of corporations.[61] Section 56A also allows adjustments for depreciation.[62] It provides for depreciation of assets as allowed by section 167 for property described under section 168.[63] This depreciation is offset by the depreciation already accounted for in the financial statements.[64]

After applying the section 56A(c) adjustments, the financial statement income is further modified for financial statement net operating losses.[65] Financial statement net operating loss is any net loss provided on the financial statement starting in 2020.[66] This loss can be carried forward to reduce the financial statement income for the next year with a net gain.[67] But, the net gain on the financial statement can only be reduced by, at most, eighty percent.[68] Any remaining carried over loss would continue to be carried on to the next year.[69] All of the adjustments made to the financial statement income create the adjusted financial statement income.[70]

While the FTC is added back into the adjusted financial statement income in section 56A(c)(5), an adjusted minimum tax foreign tax credit (AMTFTC) is removed before determining the tentative minimum tax. The AMTFTC allows a corporation to take into account

[59] I.R.C. § 56A(c)(1).
[60] I.R.C. § 56A(c)(5).
[61] See I.R.C. § 56A(c)(14) (providing adjustments for qualified wireless spectrums); I.R.C. § 56A(c)(12) (providing adjustments for tax-exempt organizations); and I.R.C. § 56A(c)(8) (providing adjustments for Alaska Native Corporations).
[62] I.R.C. § 56A(c)(13).
[63] *Id.*
[64] *Id.*
[65] I.R.C. § 56A(d).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] I.R.C. § 56A(a).

their foreign income tax if they choose to take part of the FTC.[71] The AMTFTC is the sum of two factors.[72] First, a corporations income tax from foreign sources as long as the income is taken into account on the corporation's financial statements and is paid or accrued by the corporation.[73] Second, the lesser of: the corporations pro rata share of foreign income tax for the adjusted financial statement income, as provided in section 56A(3), as long as the income is taken into account on the corporation's financial statements and is paid or accrued by the corporation; or the pro rata share as provided in section 56A(3) multiplied by fifteen percent.[74]

Thus, multiplying the adjusted minimum tax income by fifteen percent and subtracting the AMTFTC determines the tentative minimum tax for the taxable year.[75] The next step in determining the AMT is determining the regular tax a corporation owes and the section 59A tax.[76]

ii. Regular Tax and Section 59A Tax

Two types of taxes imposed by the IRC that a corporation may be already paying are removed from the tentative minimum tax to produce the AMT. The taxes are the regular tax paid subsequent to section 11 and the base erosion and anti-abuse tax (BEAT) imposed by section 59A.

A corporation's regular tax is the tax they would pay on their taxable income for a tax year without the AMT. A Corporation's taxable income is calculated by finding its receipts, or revenue, for the taxable year and subtracting any allowable deductions.[77] Common deductions

[71] *See* I.R.C. § 59(l). The FTC is "subpart A of Part III of Subchapter N" of the IRC.
[72] *Id.*
[73] I.R.C. § 59(l)(B). Income from foreign sources is as provided in section 901 of the IRC, provided the taxes are imposed by another country or possession of the United States.
[74] I.R.C. § 59(l)(A).
[75] I.R.C. § 55(2)(A).
[76] I.R.C. § 55(a)
[77] Gravelle, *supra* note 52 at 1.

include operating expenses, employee expenses, insurance, travel, bad debts, interest, equipment, taxes, professional services, advertising.[78] A twenty-one percent rate is imposed on the taxable income that results.[79] Unlike the financial income used to calculated the tentative minimum tax, the regular tax cannot be negative.[80] But, any loss in a current tax year can be carried forward to future tax years to reduce any positive tax liability.[81]

In addition to subtracting the regular tax rate, the tax imposed under section 59A is also subtracted to determine the AMT. Section 59A imposes the BEAT on "taxpayers with substantial gross receipts."[82] The BEAT was enacted by the TCJA.[83] The BEAT was created to require "some U.S. corporations to pay a minimum tax associated with deductible payments to non-U.S. related parties."[84] For the purposes of this paper we only need to know that it exists and if it is applicable to a corporation, it is also removed from the AMT.

Thus, certain corporations are required to calculate two sets of income to find their tax in two separate ways to determine their total tax liability for the year.

c. Applicable Corporations

The AMT does not apply to every business entity or every corporation. This makes sense for pass through entities, since an AMT already applies to individual, noncorporate, taxpayers.[85]

[78] Sherrie Scott, *Top 10 Corporate Tax Deductions*, CHRON (Last Accessed Apr. 10, 2021) https://smallbusiness.chron.com/top-10-corporate-tax-deductions-10403.html.
[79] I.R.C. § 11(b).
[80] Gravelle, *supra* note 52 at 1.
[81] *Id.* at 3 (the offsets are limited to eighty percent of taxable income per year).
[82] I.R.C. § 59A (taxpayers with gross receipts are most C corporations with annual gross receipts of half a billion dollars and a base erosion rate greater than three percent).
[83] Julie Goosman et al, *Insurance Tax Developments in 2019: Adapting to TCJA Guidance*, TAX NOTES FED. 1555 (June 1, 2020) https://www.taxnotes.com/tax-notes-today-federal/insurance/insurance-tax-developments-2019-adapting-tcja-guidance/2020/06/17/2ck90.
[84] *Id.*
[85] I.R.C. § 55.

But what corporations does the CAMT apply to? The short answer is applicable corporations since the AMT only applies to them.[86]

Simply put applicable corporation are certain billion-dollar C corporations. Expanding on that answer, applicable corporations are any corporation that meet the average annual adjusted financial statement income (AFSI) test for "one or more taxable years" prior to the current taxable year.[87] But, the average annual AFSI income test for prior years does not start until after December 31, 2021.[88] Thus, 2023 is the first year where an applicable corporation can exist.[89] Effectively the CAMT is not applicable until the 2023 tax year.

Once a corporation becomes an applicable corporation, it is most likely permanent, even if the corporation no longer meets the average annual AFSI test.[90] The Secretary of Treasury does have the discretion to make a corporation a non-applicable corporation if it has a "change of ownership" or does not meet the average annual AFSI test for several years."[91]

The average annual AFSI test is satisfied if a corporation's average annual AFSI exceeds one billion dollars over a three-year period.[92] Rather, if a corporation makes, on average, a billion dollars or more a year, as stated on their AFSI, for any three-year period, the corporation

[86] I.R.C. § 55(b)(2). Non-applicable corporations have a tentative minimum tax of zero, *see* I.R.C. § 55(b)(2)(B), effectively making their AMT for these corporations zero, since there would never be an excess in computing the AMT. *See* I.R.C. § 55(a).
[87] I.R.C. 59(k)(1)(A). S corporations, regulated investment companies, or real estate investment trusts are excluded from applicable corporations even if they meet the annual adjusted financial statement income test. *Id.*
[88] *See* I.R.C. 59(k)(1)(A)(ii).
[89] *See also* I.R.S. Notice 2023-7, 2022-229.
[90] Since the statute only says that the corporation is applicable if it meets the AFSI for one or more taxable years, with no indication when it is required. *See* I.R.C. 59(k)(1)(A); *see also* PWC, *Corporate Book Minimum Tax to be Effective for 2023*, PWC (Aug. 2022) (stating that "[o]nce a taxpayer is an applicable corporation, it remains an applicable corporation for all tax years in the future (unless Treasury provides an exemption).") https://www.pwc.com/us/en/services/tax/library/corporate-book-minimum-tax-to-be-effective-for-2023.html.
[91] I.R.C. 59(k)(1)(C) (only if the Secretary "determines it would not be appropriate to treat such corporation as an applicable corporation).
[92] I.R.C. 59(k)(1)(B)(i). A different annual average AFSI—one hundred million—applies for "foreign-parented multinational groups." I.R.C. 59(k)(B)(ii). For a more detailed discussion of AFSI see section II(b).

becomes an applicable corporation. Initially a corporation would have to have an annual average AFSI of a billion dollars for 2020, 2021, and 2022 to become an applicable corporation.[93]

d. How it Differs from Previous Versions

While the current version of the CAMT was passed for similar reasons and to meet similar ends as the previous version,[94] the two versions of the CAMT have several major differences. These differences seem to boil down to which corporations the CAMT applies to and how a corporation can become such a corporation, the type of income used for the calculating how the tentative minimum tax, and the kinds of adjustments allowed. Additional differences, such as the percentage of taxable income the tentative minimum tax requires,[95] or the addition of the tax imposed by section 59A,[96] exist.

As noted above, the current version of the CAMT applies only to applicable corporations.[97] In contrast the pre-2017 version applied to all corporations not exempted as a small corporation or if the corporation's AMT was less than the exemption amount.[98] The exemption was much smaller for the previous version, as a corporation would have to have an average annual gross receipts of less than seven and a half million dollars over a three-year period.[99] Further, unlike the current version of the CAMT, where the corporation can only

[93] *See* I.R.C. 59(k).
[94] *See infra* Part II.e.; *see also supra* Part I.a. Specifically, both want to try to address perceived abuses of existing tax benefits by the CAMT's imposition while increasing the tax base.
[95] The 2017 version of section 55, the previous version of the IRC with the corporate minimum tax, applied a twenty percent rate to the taxable income. I.R.C. § 55(b)(1)(B) (Effective: Dec. 18, 2015, to Dec. 21, 2017). The Current version of section 55 applies a fifteen percent to the taxable income. I.R.C. § 55(b)(2). The lower rate is possibly due to the generally lower tax rate for corporation which currently is twenty-one percent, I.R.C. § 11, as opposed to the corporate tax rate before 2017, which had several tax brackets with the highest rate of thirty-five percent for taxable income over ten million dollars. I.R.C. § 11 (Effective: [See Text Amendments] to Dec. 21, 2017).
[96] Section 59A was implemented under the TCJA so could not be considered in the pre-2017 calculation of the CAMT.
[97] *See supra* Part II.c.
[98] *See* I.R.C. § 55 (Effective: Dec. 18, 2015, to Dec. 21, 2017).
[99] *See* I.R.C. § 55(e) (Effective: Dec. 18, 2015, to Dec. 21, 2017). Gross receipts test would be lowered to an annual average gross receipt of five million dollars if it was the corporation's first three-year period. *Id.*

become ineligible if the company changes ownership, or if the Secretary of Treasury allows,[100] the previous version only had a three year requirement to become eligible for the exemption.[101] Further, the previous version of the CAMT allows for an exemption if the corporations alternative minimum taxable income is less than the exemption amount.[102]

Although the previous version of the CAMT started as a minimum tax based on the book value, that designation did not last long.[103] The previous version of the AMT eventually was based on the taxable income for the corporation's tax year with adjustments and tax preferences.[104] The new version of the AMT is based on the applicable financial statements, or rather the book value of the corporation.[105] Book value is calculated with a different purpose than the taxable income. Book income is what corporations use when periodically reporting their financials to their shareholders and the SEC, while tax income is what corporations use to determine their tax liability to the IRS.[106] These values are determined by different methods. As noted above the book income is determined by GAAP accounting procedures promulgated by the FASB for securities reporting requirements.[107] The taxable income is based on United States tax rules as set out by the IRS from legislation passed by Congress. Because the two sets of income differ in their calculation methods, the values can diverge.[108] Many of these divergences are the

[100] I.R.C. § 59(k)(1)(A)(ii).
[101] Contrasted to the current version with its perpetual status as an applicable corporation once a corporation becomes eligible. *See* I.R.C. § 55(e) (Effective: Dec. 18, 2015 to Dec. 21, 2017).
[102] *See* I.R.C. § 55(b)(1)(B) (Effective: Dec. 18, 2015 to Dec. 21, 2017) (the exemption amount was last set at forty thousand dollars).
[103] *See* Cummings, *supra* note 18.
[104] *See* I.R.C. § 55(b)(2) (Effective: Dec. 18, 2015 to Dec. 21, 2017).
[105] Supra Part II.b.
[106] Tax Foundation, *supra* note 58.
[107] Fernando, *supra* note 56.
[108] Tax Foundation, *supra* note 58. The values seem to be diverging by a greater amount since the 1990's, possibly because of changes in executive compensation. *See generally* Mihir A. Desai, *The Divergence Between Book Income and Tax Income*, 17 TAX POL'Y & ECON. 169 (2003).

result of timing such as the timing of depreciation and the carry-over of net operating loss.[109] The book value is also usually for a different period of time then the tax year.

The new CAMT has implemented several methods of reconciling these differences in the book value to calculate the tax liability due for the CAMT.[110] But, the book income also differs from the tax income in the reporting of its costs of investments, since tax income allows them to be deducted.[111] Further, treatment of certain compensation methods are treated different between the accounting methods.

These differences are largely because the accounting methods have different ends. The book income is to inform shareholders and the public about the health of a corporation and how it is being managed.[112] Thus, they are targeted to the SEC, shareholders, and investors to show the strengths, or weakness of a company. In contrast, the tax income is used for different purposes including: 1) its primary purpose of collecting revenues for the government; and 2) its secondary purpose of promoting certain policies through tax expenditures.[113] Finally, while the book income does consider taxes, the new CAMT removes them while using the book value.[114] Thus, many tax credits considered in the taxable income are not considered in the book value unless specified.

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[109] Tax Foundation, *supra* note 58.
[110] *Supra* Section II.b.i.
[111] Tax Foundation, *supra* note 58.
[112] SEC, *Beginnners' Guide to Financial Statements*, SEC (Jan. 12. 2014) (the "nutrition label" of the company) https://www.sec.gov/oiea/reports-and-publications/investor-publications/beginners-guide-financial-statements#:~:text=There%20are%20four%20main%20financial,)%20statements%20of%20shareholders'%20equity.
[113] *See* Joseph J. Minarik, *Taxation*, ECONLIB (accessed Apr. 30, 2023) https://www.econlib.org/library/Enc/Taxation.html#:~:text=Economists%20specializing%20in%20public%20finance,the%20appropriate%20balance%20among%20them.
[114] I.R.C. § 56A(c)(5).

III. WHY THE CORPORATE ALTERNATIVE MINIMUM TAX WAS PROPOSED

There seem to be two major factors for passing the CAMT: first, the CAMT would allow the government to collect taxes from large corporations that "don't pay enough in taxes;" and second, the CAMT would allow for the collection of more taxes by effectively expanding the tax base.[115]

a. Corporations Paying their Fair Share

In 2021, President Biden wanted to "ensure[] that large corporations [were] paying their fair share."[116] According to a 2021 study by Matthew Gardner and Steve Wamhoff of the Institute on Taxation and Economic Policy (ITEP), "[a]t least [fifty-five] of the largest corporations in America paid no federal corporate income taxes" in 2020 "despite enjoying substantial pretax profits in the United States."[117] The study posed companies were able to avoid paying tax because of the TCJA. The fifty-five companies reported around $40.5 billion in pretax income on their financial reports and could have paid upwards of $8.5 billion in tax.[118] Instead the companies received $3.5 billion dollars in tax rebates.[119] Further, "[t]hirty-nine profitable corporations in the S&P 500 or Fortune 500 paid no federal income tax from 2018 through 2020, the first three years that the Tax Cuts and Jobs Act (TCJA) was in effect."[120]

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[115] *See* Cummings, *supra* note 18. The CAMT has the added benefit of increasing the tax base without being categorized as a tax increase. Laura Davison, *How the 15% US Minimum Corporate Tax Would Work: QuickTake*, BLOOMBERG TAX (Aug. 1, 2022, 4:02 PM) https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X77EVM60000000?bna_news_filter=daily-tax-report#jcite.
[116] White House, *Fact Sheet: The American Jobs Plan*, WHITE HOUSE (Mar. 31, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.
[117] Gardner & Wamhoff, *supr*a note 4 at 1.
[118] *Id.*
[119] *Id.*
[120] Matthew Gardner & Steve Wamhoff, *Corporate Tax Avoidance Under the Tax Cuts and Jobs Act*, ITEP 1 (Apr. 2021) (while some of the corporations paid income taxes in one year, their net balance over the period was zero after tax credits).

What is interesting is that these findings are not based on what these corporations actually paid but what they reported in their financial statements.[121] In addition, Gardner and Wahmhoff seem to be looking at the current domestic provisions for federal income tax on the financial statements without considering the deferred provisions for federal income tax.[122] "The deferred income tax is a liability that the company has on its balance sheet but that is not due for payment yet."[123] Thus, the fact that these corporations paid zero dollars in tax is based entirely on estimates generated for their book value, not on their actual taxable income.

However, there is a perceived inequity between corporations earning "billions" of dollars in revenue while seemingly being able to pay zero dollars in income tax. This perceived inequity has been a motivating factor for not only the most recent version of the CAMT, but also the 1986 version and the original AMT. Gardner and Wahmhoff claim that US corporations have been finding ways to shield "their profits from federal income taxation" since at least the tax cuts that occurred under the Regan administration.[124] A majority of Americans also feel that some corporations do not pay enough in taxes.[125] This feeling is especially prevalent in Democratic voters.[126] The amount of income taxes corporations pay, or rather the lack thereof, is often cited

[121] Gardner & Steve, supra note 4 at 1.
[122] For example, Gardner & Wamhoff claim that FedEx was paying no federal income tax in 2020 and received $230 million in tax rebate. *Id.* at 3. But FedEx's annual report estimated FedEx to have $67 million in current state and local income tax, $198 million in current foreign income tax, and had deferred federal income tax of $475 million with an additional million dollars in deferred state and local income tax effectively and a rebate of $128 million in deferred foreign income tax for a total income tax of $383 million creating an effective tax rate of twenty-three percent. FedEx Co., Annual Report (Form 10-K) (Jul. 7, 2020). https://www.sec.gov/ix?doc=/Archives/edgar/data/0001048911/000156459020032775/fdx-10k_20200531.htm
[123] Tax & Accounting, *What is a provision for income tax and how do you calculate it?*, THOMSON REUTERS (Feb 1, 2023) https://tax.thomsonreuters.com/blog/tax-provision-how-to-calculate-it/#:~:text=The%20deferred%20income%20tax%20is,tax%20rate%20to%20that%20total.
[124] *Id.*
[125] J. Baxter Oliphant, *Top Tax Frustrations for Americans: The Feeling That Some Corporations, Wealthy People Don't Pay Fair Share*, Pew Research (Apr. 7, 2023) (with sixty-one percent of adults saying that it bothers them a lot and another twenty-two percent of adults saying it bothers them some) https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share/.
[126] *Id.* Seventy-seven percent of democrats and democratic leaning voters are bothered a lot by the taxes corporations pay as opposed to forty-six percent of republicans and republican leaning voters, a not insignificant amount.

by politicians as ways to fund social services and other federal and state needs.[127] Thus, there exists a political drive to do something about the taxes these corporations pay, or rather are perceived to not pay. The CAMT was President Biden's proposal to make sure that "large, profitable corporations cannot exploit loopholes in the tax code to get by without paying U.S. corporate taxes."[128] Something does have to be done to correct the perception that corporations are not paying their fair share in taxes, as the perception that corporations do not pay their fair share, especially the largest corporations, could undermine the tax system.[129] But is the CAMT the best measure to do so?

b. Raise Corporate Tax Rate

The other major reason for the CAMT, seemingly flowing from corporations not paying their fair share of taxes, is broadening the corporate tax base. The CAMT is seen as a "major revenue raiser in the Inflation Reduction Act.[130] The Joint Committee on Taxation (JCT) projects the CAMT to generate $222.2 billion in additional revenue projected over a nine-year period.[131] Over the same period, the Congressional Budget Office has projected that corporate income taxes will generate over four and a half trillion dollars in tax revenues.[132] The additional

[127] *See* Lizzie Seils, Corporations aren't paying fair share in taxes according to an Economic Policy Institute report, WGEM (Apr. 14, 2022); *see also* Patty Murray, On Tax Day, Senator Murray Highlights the Cost of Tax Dodging by Billionaires and Giant Corporations at Budget Hearing, U.S. Senator Patty Murray (Apr. 18, 2023) (saying that trillions of dollars of lost tax revenue from corporations could be used to rebuild "America's broken child care system") https://www.murray.senate.gov/on-tax-day-senator-murray-highlights-the-cost-of-tax-dodging-by-billionaires-and-giant-corporations-at-budget-hearing/.
[128] White House, *supra* note 116.
[129] Especially when over half Americans believe they are paying more than their fair share in taxes. Oliphant, *supra* note 125.
[130] Gravelle, *supra* note 52 at 5.
[131] JCT, *Estimated Budget Effects of the Revenue Provisions Off Title I – Committee on Finance, of an Amendment in the Nature of a Substitute to H.R. 5376, "an Act to Provide for Reconciliation Pursuant to Title II ff S. Con. Res. 14," as Passed by the Senate on August 7, 2022, and Scheduled for Consideration by the House Of Representatives on August*, JCT 1 (Aug. 9, 2022) (the report shows ten years, FY2022 to FY2031 but the first year does not generate any income, so the projection is really over a nine year period) https://www.jct.gov/publications/2022/jcx-18-22/.
[132] *See* Congressional Budget Office, *The Budget and Economic Outlook: 2022 to 2032*, CONG. BUDGET OFFICE 7 (May, 2022) (the total estimated corporate income tax from 2023 to 2031 is $4.633 trillion dollars out of $49.837 trillion dollars in total tax revenue) https://www.cbo.gov/system/files/2022-05/57950-Outlook.pdf.

$222.2 billion dollars generated by the CAMT would increase the revenue generated by corporate income tax by around five percent.[133] The CAMT would generate the same amount of income as increasing the corporate income tax rate by a little more than one percent, ceteris paribus.[134] The Congressional Budget Office has proposed increasing the corporate tax rate by one percent as a method of reducing the United States' mounting deficit for the past few years.[135]

Thus, the CAMT would allow Congress to indirectly increase the corporate tax rate by at least one percent, possibly more, possibly less, without increasing the actual corporate tax rate. This has the benefit of allowing Congress to increase the corporate tax base by collecting more corporate income tax while technically not raising any taxes.[136] In addition, Congress can get the same results, assuming the projections are accurate, while taxing less of the corporate tax base, since only corporations making more than a billion dollars would be taxed.[137] The vast majority of C-corporations would not be affected by the CAMT, where every corporation would be affected by raising the corporate tax rate.[138] All of this assumes however, that the CAMT will

[133] The calculations done by the Congressional Budget Office indicate a 5.8 percent increase in corporate tax revenue, but Gravelle's calculations seem to include the corporate income for 2022 and seem to be based on July 2021 forecast. Gravelle, *supra* note 52 at 5; see also Congressional Budget Office, *An Update to the Budget and Economic Outlook: 2021 to 2031*, CONG. BUDGET OFFICE 2 (July, 2021) https://www.cbo.gov/system/files/2021-07/57218-Outlook.pdf. "As a result of upward revisions to the forecast of nominal GDP, revenues . . . corporate taxes [were] projected to be higher than CBO projected in July 2021." Congressional Budget Office, *supra* note 132 at 116.

[134] Gravelle's estimated that it had the same effect as raising the corporate tax rate by around two percent. Gravelle, *supra* note 52 at 6.

[135] *See* Congressional Budget Office, *Options for Reducing the Deficit, 2023 to 2032 Volume II: Smaller Reductions*, CONG. BUDGET OFFICE 58 (Dec. 2022) https://www.cbo.gov/system/files/2022-12/58163-budget-options-small-effects.pdf; *see also* Congressional Budget Office, *Options for Reducing the Deficit: 2021 to 2030*, CONG. BUDGET OFFICE 77 (Dec. 2020) https://www.cbo.gov/system/files/2020-12/56783-budget-options.pdf.

[136] See Davison, *supra* note 115. Though it is not certain how controversial raising corporate tax would be considering that most democratic and democratic leaning voters and a little less than half of republican and republican leaning voters think that corporations are not being taxed enough. Oliphant, *supra* note 125.

[137] *Supra* Part II.b.

[138] The census recorded over two million c-corporations and other corporate legal forms of organization not including s-corporations in 2021. Economic Surveys, *All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021*, US CENSUS BUREAU (April 27, 2023) https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP.

capture as much tax revenue as planned and the expected CAMT tax revenue has already been adjusted downwards at least twice.[139]

Yet, if the true goal of the CAMT is to raise taxes, it is much narrower than it could be. Corporations with no effective federal income taxes is not a problem reserved for the largest corporations. Between 2014 and 2018 about sixty-eight percent of all corporations, approximately fifty thousand a year, did not pay any federal income tax.[140] The government is leaving possibly millions or billions of dollars of extra income on the table by leaving out the vast majority of corporations. Further, the cut off amount of one-billion dollars seems to be arbitrary. There does not seem to be much of a distinction between a company that makes one billion dollars verses 999 million dollars, a relatively small difference. This gap could possibly disincentivize generating income at the margins, and likely increasing gamesmanship once the new rule has been incorporated into a corporation's tax planning. Even excluding a blanket CAMT, some form of phase-in income would be able to generate additional income. Further, even if the CAMT does not directly affect smaller companies, it will increase their cost of doing business, as they need to learn how the CAMT affects them,[141] without raising revenues for the government. It seems that the CAMT, rather than being a policy designed specifically to tax, is a policy to punish certain companies deemed to be too large not to pay taxes.

c. Additional Benefits

While not being main factors, several additional benefits are argued for the CAMT. We will examine three—that it: stops corporations from using loopholes to avoid taxes; that it will

[139] Gravelle, *supra* note 52 at 5-6. The original projections where $313 billion over the same period but was reduced to $258 billion after tax recovery was allowed for "depreciation and wireless spectrum rights. *Id.* Another $35 billion was shaved off for "exemptions for portfolio companies." *Id.* at 6.
[140] GOA, *supra* note 139 at 12.
[141] Bill Henson, *Inflation Reduction Act Burdens Small and Midsize Businesses: Opinion*, CFO (Sept. 14, 2022) (especially those companies with significant overseas presence).

improve the tax code in general; and that it will improve financial transparency of corporations. But upon further examination, these arguments do not seem to be convincing.

i. Avoid Tax Loopholes

As noted above, Gardner and Wamhoff argue that fifty-five extremely large corporations were able to avoid federal corporate income taxes in 2020 alone.[142] These companies had an annual pretax revenue of more than forty billion as reported on their annual financial reports.[143] Gardner and Wamhoff's report was cited widely by the Biden administration and other politicians as a clear example of "billion dollar" corporations not paying their "fair share."[144] How were these corporations able to "avoid" paying taxes? The reasoning is that these corporations took advantage of tax loopholes.[145] Gardner and Wahmhoff cite several "familiar tax breaks" that corporations are using to reduce their tax burden to zero.[146] They cite: tax breaks for executive stock options and renewable energy; tax credits for research and experimentation (R&E); and accelerated depreciation as ways companies were able to reduce their tax burden to zero.[147] Tax loopholes and taking advantage of current tax credits seems to be a common complaint against corporations.[148]

Yet, corporations are not breaking any laws when they are taking advantage of these tax breaks. In fact, it almost seems like a misnomer to consider these breaks as loopholes. A loophole is defined by Black's Law Dictionary as an ambiguity, omission, or exception "that

[142] Gardner & Wahmhoff, *supra* note 4 at 1.
[143] *Id.*
[144] *See* White House, *supra* note 33 at 55 n.149; see also Staff, *supra* note 33 at 1 n.2 (Nov. 2021).
[145] Gardner & Wamhoff, *supra* note 4 at 1.
[146] *Id.* at 4.
[147] *Id.*
[148] See Amy Hanauer, *Corporate Tax Reform in the Wake of the Pandemic*, ITEP 12 (April 2021); see also Staff, *supra* 33 at 1 (stating the CAMT would be used for billion-dollar corporations that "use loopholes and accounting gimmicks to pay little to nothing in taxes, like getting a tax break for exorbitant executive compensation").

provides a way to avoid a rule without violating its literal requirements."[149] A tax loophole is cordoned off as a "tax-code provision that allows a taxpayer to legally avoid or reduce income taxes."[150] As such, any legal reduction in income, validated by Congress, becomes a "loophole."

The negative connotations of loopholes imply a deceptive nature behind a business's conduct.[151] But Congress often has reasons for creating these reductions. A backdoor method of getting spending passed is through an addition of a provision in the tax code providing an additional deduction or credit for the desired activity.[152] These are often referred to as tax expenditures.[153] While it is debatable that all tax expenditures, especially corporate tax expenditures, actually achieve their goals,[154] plenty of spending programs have been seen as wasteful and ineffective.[155] It therefore seems that "loophole" is a buzzword often used to characterize tax policies which someone opposes.[156] Thus, instead of addressing these disagreements over tax policy directly, the CAMT allows for policymakers to avoid the question of which policies are actual tax loopholes and how they should be fixed, while claiming they are holding those abusing the tax policy accountable. Yet the CAMT has been proposed as the only workable solution to address these "loopholes."[157]

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[149] *Loophole*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[150] *Id.*
[151] Opportunity Washington, *You Say "Loophole," I Say "Potahto": Understanding the Way We Talk About Tax Policy and Finding Ways to Clarify the Conversation*, OPPORTUNITY WASH. (Wed., May 10, 2017) (most references to "loopholes" are pejorative and intend to express criticism). It would be interesting to see what taxpayers in college would think if they were accused of using a loophole when claiming their American Opportunity Credit.
[152] *See* Frank Sammartino & Eric Toder, *Tax Expenditure Basics*, TAX POL'Y CTR. 2 (Jan. 22, 2020) https://www.taxpolicycenter.org/sites/default/files/publication/158324/tax_expenditure_basics.pdf.
[153] *Id.*
[154] *Id.*
[155] *See generally* White House, *March 09, 2023, Fact Sheet: The President's Budget Cuts Wasteful Spending on Big Pharma, Big Oil, and Other Special Interests, Cracks Down on Systemic Fraud, and Makes Programs More Cost Effective*, WHITE HOUSE (Mar. 9, 2023).
[156] Opportunity Washington, *supra* note 151.
[157] *See* Reuven S. Avi-Yonah, *The Case for Reviving the Corporate AMT*, TAX NOTES (Nov. 8, 2021) https://www.taxnotes.com/featured-analysis/case-reviving-corporate-amt/2021/11/05/7ck9x.

ii. Improve the Tax Code

Another benefit is that the CAMT would improve the tax code by bringing fairness for those corporations which do not pay enough corporate tax.[158] But it seems that "[n]o one believes it reflects good tax policy."[159] Supporters have put it forward as a second-best solution to political reality.[160] It seems more like a solution to tax problems caused by some corporations using existing tax policy too much, rather than a viable solution. The solution to tax expenditures is another layer of complexity to an already complex tax system. Thus, a more complex tax code would make the IRC harder to use, and at minimum, will leave the tax code no better off.

iii. Improve Financial Transparency

Another proposed benefit of the CAMT is that it will increase financial transparency.[161] Since the financial disclosures follow book income closer than corporate tax, it is posited that CAMT will incentivize management to "not inflate financial income because it results in more AMT being paid."[162] Thus, financial disclosure would be improved.

Yet this claim seems to be based more on speculation. An increase in financial transparency does not seem to be likely. A study by a former Hill staffer and some well-regarded practitioners and academics looked at the briefly lived 1986 version of the CAMT which focused on the book value and found that some of the "affected corporations did, in fact, manage down their book income."[163] Yet there is no indication as to whether this was corporations deflating their value to reflect true statements, or shifting revenue and expenses to

[158] See Staff, *supra* note 33 at 1.
[159] Cummings, *supra* note 18.
[160] *See* Avi-Yonah, *supra* note 157.
[161] *Id.*
[162] *Id.*
[163] Cummings, *supra* note 18.

minimize their additional tax. Further, it is unclear if the abetment would be conducted by corporations of similar size to those affected by the new CAMT.[164]

Equally plausible claims is that the CAMT will have no effect on financial disclosures as the companies reporting would have too much of a benefit from posting large profits to want to adjust their statements.[165] Also plausible is that corporations will use gamesmanship to shift tax liabilities away from their book value reducing "the information quality of [their] book income."[166] Thus, it is uncertain if the CAMT will have any effect on financial transparency, or even a positive effect.

Finally, with all of these proposed benefits, there is one immense draw back.

IV. A BIG PROBLEM

The CAMT gives some of Congress's power—determining what is taxable income—to an unelected organization, for some corporate tax income. A key part of the CAMT is the reliance on corporations' book value based on regularly released financial statements.[167] As noted, most book values are based on the standards set by the FASB.[168]

FASB is "an independent, private-sector, not-for-profit organization based in Norwalk, Connecticut, that establishes financial accounting and reporting standards for public and private companies."[169] It has seven members who are appointed by trustees for five to ten year terms.[170] FASB is important because the SEC has billed them as the "standard setter for public

[164] *Id.*
[165] *Id.*
[166] *See* Kyle Pomerleau, *Joe Biden's Alternative Minimum Book Tax*, 169 TAX NOTES FED. 109, 113 (2020) https://www.aei.org/wp-content/uploads/2020/11/Pomerleau-On-the-Margin-October-5-2020.pdf?x91208.
[167] *See supra* Part II.
[168] *Id.*
[169] FASB, *supra* note 56.
[170] *Id.*

companies."[171] While it may be a problem for an un-elected non-governmental board to set standards, FASB was only setting standards for information companies needed to provide to investors for reporting purposes. Now changes made by FASB can have a direct effect on the taxable income of corporations.[172] Congress could then try to lobby and influence FASB to either broaden or narrow the tax base, accordingly, indirectly affecting the reporting standards to investors.[173] Even more concerning is the potential for corporations to lobby FASB for favorable financial ratings. "[J]ust because corporate America isn't currently lobbying FASB, that doesn't mean they won't start tomorrow."[174] And if corporate lobbying does occur, the respect that is held in book income could be destroyed not just for the CAMT but for investor information.

V. AN OLD SOLUTION FOR AN OLD PROBLEM

A CAMT is not a new solution for what is seen as corporations avoiding taxes. Every iteration of the CAMT was based on the presumption that corporations needed to pay more taxes. And the solution was always to impose the CAMT. The CAMT is often cited as the only "practical solution" to the problem of large corporations not paying taxes.[175] But does the CAMT work?

For the past forty years the corporate tax has fluctuated around two percent of gross domestic product.[176] Between 2002 and 2022 corporate income tax revenues fluctuated with a low of

[171] *Id.*
[172] See Pomerleau, *supra* note 166 at 114.
[173] *Id.*
[174] Robert Goulder & Joseph Thorndike, *Breaking Down the Inflation Reduction Act's Corporate Alternative Minimum Tax*, FORBES (Oct 19, 2022) https://www.forbes.com/sites/taxnotes/2022/10/19/breaking-down-the-inflation-reduction-acts-corporate-alternative-minimum-tax/?sh=5d08e5102395.
[175] Staff, *supra* note 33 (advocating for the imposition of the CAMT to restore "tax fairness"); *see also* Avi-Yonah, *supra* note 157 (stating the CAMT was the only practical solution due to the political reality).
[176] GOA, *Corporate Income Tax: Effective Rates before and after 2017 Law Change*, GOA 5 (Dec. 2022).

$125 billion in 2002 and a high of $366 billion in 2006.[177] Corporations did not stop paying taxes when the CAMT was repealed. A study conducted by Gardner, Robert McIntyre, and Richard Philips of the ITEP found that between 2008 and 2015, around thirty companies paid effective tax rates of less than ten percent with eighteen paying no federal income tax for that entire period.[178] It is also based on the assumption that the book value is harder to manipulate.[179] But many financial crises have shown this not to be the case.[180]

But why do legislatures keep going back to the same well? Because they are trying to have their cake and eat it.[181] Legislatures want to address the issue without addressing the underlying causes. Professor of Law, Reuven Avi-Yonah at the University of Michigan argues that it is a second-best measure since political reality makes it near impossible to revise corporate benefits.[182] "Some observers that normally would oppose a minimum tax as bad tax policy have supported the new CAMT as the best political compromise available under current conditions."[183] And that is exactly what is being pushed forward—a bad tax policy to combat bad tax policies. Instead of doing the hard work and closing any gaps or "loopholes," legislatures are painting over the cracks and adding to an even bigger problem, the tax code's increasing complexity.

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[177] St. Louis FED, Federal Government: Tax Receipts on Corporate Income, FRED (Accessed April 30, 2023) https://fred.stlouisfed.org/series/FCTAX.
[178] Matthew Gardner, Robert S. McIntyre, & Richard Phillips, *The 35 Percent Corporate Tax Myth Corporate Tax Avoidance by Fortune 500 Companies, 2008 to 2015*, ITEP 3 (March 2017).
[179] Charvat & Knoll, *supra* 31 at 305.
[180] *Id.* (The financial accounting abuses at Enron, WorldCom, Global Crossing and Qwest showed that book income can also be heavily manipulated and therefore is not necessarily a more accurate measure of performance than taxable income).
[181] *See* Cummings, *supra* note 18.
[182] *See* Avi-Yonah, *supra* note 157.
[183] Cummings, *supra* note 18.

The Taxpayer Advocate Service (TAS) stated that the most serious problem facing taxpayers and the IRS is the complexity of the IRC.[184] This complexity:

> [1] Makes compliance difficult, requiring taxpayers to devote excessive time to preparing and filing their returns;
> [2] Requires the significant majority of taxpayers to bear monetary costs to comply, as most taxpayers hire preparers, and many other taxpayers purchase tax preparation software;
> [3] Obscures comprehension, leaving many taxpayers unaware how their taxes are computed and what rate of tax they pay;
> [4] Facilitates tax avoidance by enabling sophisticated taxpayers to reduce their tax liabilities and by providing criminals with opportunities to commit tax fraud;
> [5] Undermines trust in the system by creating an impression that many taxpayers are not compliant, thereby reducing the incentives that honest taxpayers feel to comply; and
> [6] Generates tens of millions of telephone calls to the IRS each year, overburdening the agency and compromising its ability to provide high-quality taxpayer service.[185]

When legislatures pass the buck and do not address the burdens that are created by misstructured tax policy, they are putting the burden onto taxpayers—in this case corporations. These corporations are then incentivized to hire creative tax planners to try to reduce their tax liability.[186] The complex nature of the double taxation created by the CAMT further obfuscates the actual tax liability of corporations. Corporations are further removed from their tax liability, and some are still likely to show no tax revenues on their financial statements. It also adds another avenue for corporate taxpayers to try to avoid the new tax, as all billion-dollar companies are likely to be sophisticated taxpayers. Not addressing the issues will further erode the trust in the tax system and may possibly make it worse if taxpayers still see corporations avoiding taxes even after its

[184] Taxpayer Advocate Service, The Complexity of the Tax Code, 2012 Annual Report to Congress — Volume One [hereinafter "Complexity"] pg 3 https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Most-Serious-Problems-Tax-Code-Complexity.pdf. TAS is an "independent organization within the IRS" which "ensures that every taxpayer is treated fairly" and understands their rights. Taxpayer Advocate Service, *We're your voice at the IRS*, IRS (Accessed May 14, 2023) https://www.taxpayeradvocate.irs.gov/.
[185] Complexity, *supra* note 184 at 3.
[186] *See* Avi-Yonah, *supra* note 157.

implementation. Finally, it would add a further burden to the IRS as more companies try to define and figure out the contours of the CAMT. Thus, while it is an old solution, it is a significantly flawed solution.

CONCLUSION

Increased dissatisfaction with the amount of taxes corporations are paying is prevalent amongst individuals in the United States,[187] especially aggravated by the perception that some corporations are not carrying their fair share of the tax burden. The CAMT was proposed to hold these companies responsible but from a tax policy standpoint, it is bad tax policy. A CAMT seems like a way to make corporations pay their fair share—at least until they learn its contours—but it does not address the underlying issue that create the discrepancies in the tax code. Instead of simplifying or making the existing tax policy better suited to meeting the goals of the legislature, the CAMT is a short cut to expedite a tax on corporations. Further, it adds to the complexity of the IRC which will inevitably lead to problems down the road as it increases taxpayer burden and can lead to deterioration in the trust held in the IRC. Instead, Congress needs to work to reduce the complexity in the IRC and create tax policy focused on revising any misused tax policy in a way that is beneficial for all taxpayers. "From the standpoint of reducing taxpayer burden, simpler is better."[188] The CAMT does not make the IRC simpler nor better.

[187] Oliphant, *supra* note 125.
[188] *Id.* at 4.

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